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 SR., derivatively on behalf of BAYER AG, Plaintiffs, vs. WERNER BAUMANN, *et al.*, Defendants, - and - BAYER AG, Nominal Defendant.	:	Index No. 651500/2020

Plaintiffs' Memorandum of Law in Opposition to the Bank Defendants' Motion to Dismiss the Verified Shareholder Derivative Complaint

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I. INTRODUCTION AND OVERVIEW

This action alleges the Bayer Defendants' breaches of their duties of care, diligence, and loyalty under the German Stock Corporation Act ("GSCA"), *i.e.*, "***care of a diligent and conscientious manager***" regarding "***acquisitions***" in connection with Bayer's disastrous June 2018 $66-billion, all-cash acquisition of Monsanto Inc. ("Monsanto") (the "Acquisition"). GSCA §§53, 93, 116. BofA Securities, Inc./Bank of America/Merrill Lynch ("BofA") and Credit Suisse Group AG/Credit Suisse AG ("CS") (together, the "Banks") influenced and induced Bayer to make this "worst acquisition in history." As Bayer's advisors and bankers for the Acquisition, the Banks' liability arises from GSCA §117:[1]

> **Section 117 Exertion of Influence on the Company**
>
> (1) ***Any person who***, ***by exerting his influence on the company***, ***induces a member of the management board or the supervisory board***, ***to act to the disadvantage of the company or its shareholders shall be liable to the company for any resulting damage***.

Seeking dismissal of the well-pleaded claims against them,[2] the Banks claim that letters signed with their subsidiaries or affiliates ***conclusively establish*** that the Banks, as the parent consolidated financial entities, cannot be held liable. This claim fails ***factually and legally***. Named as defendants, the corporate-parent Banks ***are*** the legal entities that controlled and utilized whatever subsidiaries or affiliates that performed work in

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[1] Relevant excerpts from the GSCA and the NY Business Corporation Law ("BCL") are attached as Addendum A and Addendum B.

[2] Bayer, the Bayer Defendants and the Bank Defendants have moved separately to dismiss the SAC. Plaintiffs are filing three briefs in opposition to the motions: this opposition to the Bank Defendants' motion (the "Banks Brief"), a "Personal-Jurisdiction Brief" (in opposition to the Bayer Defendants' and Bayer's motions) and a "Standing Brief" (in opposition to Bayer's motion). Each opposition brief adopts in full all arguments made in the other briefs.

connection with the Acquisition. Their names and their identities—not those of signatory subsidiaries/affiliates—were disclosed in Bayer's press releases, reported in the financial press and contained in regulatory filings and the Acquisition Financing prospectuses. It was the Banks' consolidated financial reports that benefitted from their $700 million in fees from the Acquisition. In any event, GSCA §117 does not require "privity" or any contractual relationship between the company and the wrongdoer for legal liability. All §117 requires is the wrongdoer's ***exercise of*** "***influence***" ***and*** "***inducement***" ***to act—and that has been pleaded in the SAC***.[3] ¶¶27, 50–52, 197–201, 207–209. It was the Banks' NY offices that helped structure the deal to entrench the Bayer insiders, did the failed due diligence,[4] made the $60 billion "Bridge Loan" and managed the billions in follow-on Acquisition Financings. ¶¶202–204. The Banks are thus properly named as defendants.[5]

Investment-banking misconduct in merger-and-acquisition ("M&A") deals, where bankers operate under conflicts of interest and destroy shareholder value, have become all too common. In this instance, not only does the misconduct of these Banks in this Acquisition epitomize this phenomenon, it involves two Banks that had "***checkered pasts***"***—prior instances of due-diligence failures in their own acquisitions and other***

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[3] The SAC refers to Plaintiffs' December 9, 2020 Second Amended Verified Derivative Complaint (NYSCEF No. 35; Affirmation of Lara Samet Buchwald Exhibit 1 (NYSCEF No. 44)). The allegations in the SAC are cited as "¶___." Unless otherwise noted, all emphases in quoted texts are added, and all internal citations are omitted.

[4] A sketch of the failed due diligence by the Defendants is set forth in Plaintiffs' Standing Brief at 7–13. Additional details are set forth in pages 84 through 148 of the SAC.

[5] The Banks' venue/*forum non conveniens* arguments are meritless and dispensed with in Plaintiffs' Personal-Jurisdiction Brief at 3–20. The Acquisition was centered in NY and the Banks' NY operations were involved from beginning to end. *See*, *e.g.*, ¶¶176–182, 246–247, 273–274.

misbehavior*, *including criminal misconduct—resulting in billions in penalties while causing huge losses to clients and third parties. ¶¶103–132.

Despite those failures, the Bayer Supervisors chose these Banks ostensibly to ***protect*** Bayer and its shareholders in the largest and most risky acquisition in German corporate history. Because the Bayer Supervisors ignored these "checkered pasts" in relying on the Banks in this Acquisition, Bayer and its shareholders paid the price. And they used these Banks on terms that created conflicts of interest and deprived the Banks of their independence. All of the Banks' fees—***hundreds of millions of dollars—were contingent on the Acquisition closing***, regardless of the consequences to Bayer or its shareholders. ¶¶50–52, 197–199. The Acquisition—resulting in disastrous consequences to Bayer—is the most recent episode in these Banks' pattern and practice of misconduct. ¶¶103–113, 115–132.

II. ARGUMENT

A. Plaintiffs Properly Sued the Consolidated Corporate Entities That Were the Advisors to, and Financers of, Bayer's Acquisition of Monsanto

The Banks' "retention-letters" argument is factually incorrect and legally irrelevant. ***In an insult to this Court*, *the Banks never even cite or discuss §117—the GSCA provision upon which their liability is based***. ¶143.

Section 117 does not require any contractual relationship or privity between the company and the wrongdoer. ***It forbids*** "[*a*]***ny person***" ***from*** "***exerting influence***" ***on the*** "***company***" ***or its supervisors or managers***, "***inducing***" ***them to act to the*** "***disadvantage***" ***of the company or shareholders***. It does not matter which affiliate or subsidiary of the Banks—whether in the U.S. or abroad—had signed retention letters.

What matters is ***who is alleged to have exerted influence to induce the damaging conduct***. That is alleged in detail as to both Banks. ¶¶ 27, 50–52, 197–209.

Acting as Bayer's financial advisors and bankers, the Banks were instrumental in this deal from beginning to end. All they did was help conceive, structure and finance the "***worst acquisition in history***," including conducting the failed due diligence into Monsanto's business, litigation and liabilities. They helped promote the deal to investors all over the world—including in NY—to raise billions by selling new Bayer securities to pay down their own huge "bridge loan" and help finance the Acquisition. Their conduct was essential to the Acquisition being decided upon, pursued, financed and closed. As such, the Banks are "***liable to the company for any resulting damage***." GSCA §117.

The Acquisition was a toxic stew of conflicted self-dealing amid a lack of due diligence. The Banks were supposed to protect Bayer and its shareholders. Instead, they helped the Bayer insiders structure the Acquisition as all-cash—loading Bayer up with $50-plus billion in debt, to operate as a "***poison pill***" to make Bayer "***unacquirable***"—avoiding any takeover attempt by Pfizer, which became free in 2016 to seek another target after its long-pending acquisition of Allergan had been terminated. ¶¶26–27. In addition to their own conflicts, the Banks also knew that ***Baumann***, ***Wenning and the Board*** were acting to improperly entrench themselves. Even though the Banks ***represented Bayer***, they helped Baumann and Wenning and influenced the Supervisory Board to approve actions undertaken ***to entrench themselves***, because the Banks were going to make hundreds of millions of dollars from the deal. ¶¶27, 50–52, 201. This entrenched the Bayer insiders in their positions of power, prestige and profit, at the expense of Bayer and its shareholders, while the Banks pocketed $700 million in fees.

Both Banks ***extolled their involvement*** in the "largest acquisition in German history"—garnering "the largest banking fees ever." ***But that was before they were sued and now try to point fingers at their subsidiaries/affiliates***. Before being sued, the Banks were not at all shy about how they brought about the Acquisition:

- ***Credit Suisse Group AG's***[6] 2016 Annual Report noted its "Investment Banking [division] delivered a strong performance in 2016 due to "***several marquee transactions with teams advising*** [***and acting***] … ***as a joint lead advisor to Bayer AG in its USD 66 billion acquisition of Monsanto***." Affirmation of Albert Y. Chang ("Chang Aff.") Ex. 5 at 8.
- A ***Bank of America*** July 7, 2017 press release publicized its: "Awards for Excellence … for Advisory"—"Best in class advice to clients about M&A"—due to "***the company's role in advising Bayer on its $66 billion agreed***

[6] Credit Suisse describes the main parts of its business involved in this lawsuit as:

> **Investment Banking & Capital Markets**
>
> The Investment Banking & Capital Markets division offers a broad range of investment banking products and services which include advisory services related to M&A, divestitures, takeover defense strategies, business restructurings and spin offs, as well as debt and equity underwriting of public offerings and private placements.
>
> ***
>
> We operate as an integrated bank, combining our strengths and expertise in our three global divisions, Private Banking, Investment Banking and Asset Management, to offer our clients advisory services.
>
> We deliver our investment banking capabilities through regional and local teams based in both major developed and emerging market centers. Our integrated business model enables us to deliver …. expertise across Credit Suisse.

Chang Aff. Ex. 5 at 8, 23; *id*. Ex. 6 at 8.

takeover of Monsanto in the U.S.**, **the largest foreign takeover by a German company and the largest all**[-]**cash M&A deal in history."[7] *Id.* Ex. 7 at 2.

Bayer's May 23, 2016 release identifies "BofA Merill Lynch and Credit Suisse" —not their subsidiaries—as its "financial advisors":

> Together with our financial advisors, BofA Merrill Lynch and Credit Suisse, we have engaged in an extensive analysis of the potential financing options available to Bayer and we are highly confident in our ability to secure full financing commitments .... ***Our financial advisors have provided us with highly confident letters for the proposed transaction***.

Id. Ex. 8 at 3. Likewise, in a May 23, 2016 media presentation, Baumann stated: "We are highly confident of our ability to finance the Transaction based on advanced discussions with and support from ***both Bank of America Merrill Lynch and Credit Suisse***." *Id.* ¶12 & Ex. 9 at 1.

The financial press understood which Banks were involved. On September 14, 2016, *CNBC* reported:

Bayer Clinches Monsanto With Improved $66 Billion Bid

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[7] Bank of America's release stated:

> Bank of America is one of the world's leading financial institutions, serving … large corporations with a full range of banking … services.
>
> Bank of America Merrill Lynch is the marketing name for the global banking and global markets businesses of Bank of America Corporation. Lending [and] other commercial banking activities are performed globally by banking affiliates of Bank of America Corporation … other investment banking activities are performed globally by investment banking affiliates of Bank of America Corporation including … Merrill Lynch, Pierce, Fenner & Smith Incorporated ….

Chang Aff. Ex. 7 at 3.

> Bayer said Bank of America/Merrill Lynch, Credit Suisse, had committed to providing the bridge financing. Bank of America/Merrill Lynch and Credit Suisse are acting as ***lead financial advisers to Bayer***.

Id. Ex. 10 at 4. On September 14, 2016, *Reuters* reported:

> **Credit Suisse Bank of America Lead Financial Advisors to Bayer in Monsanto Deal**
>
> Credit Suisse acting with Bank of America Merrill Lynch as ***lead financial advisors and structuring banks to Bayer in addition to providing committed financing for the Bayer/Monsanto deal***.

Id. Ex. 11 at 1–2.

In order to obtain the approval of its shareholders for the sale of Monsanto, Monsanto filed a 14A Proxy Statement with the Securities and Exchange Commission, stating:

> In connection with the execution of the merger agreement, Bayer entered into a syndicated term loan facility agreement with ***Bank of America, N.A., Credit Suisse AG***.

Id. Ex. 12 at 6. We know from that Proxy that "***Merrill Lynch, Pierce, Fenner & Smith Incorporated***" was "***a financial advisor to Bayer***" (*id.* at 31); that Monsanto's financial advisor "spoke to a representative of Merrill Lynch, Pierce, Fenner & Smith Incorporated" on several occasions about "***value, deal certainty issues and transaction process***," as well as due diligence issues (*id.* at 31–32) ***and that Monsanto made*** "***due***[-]***diligence materials***" ***available to Bayer's*** "***financial advisors***" (*id.* at 35, 41).

Bayer's Third Quarter 2016 report represented "syndicated bank financing for approximately $57 billion was initially committed by ***Bank of America Merrill Lynch, Credit Suisse***." Chang Aff. Ex. 13 at 43. When the deal was signed on September 14, 2016, Bayer announced:

> Bayer intends to finance the transaction with a combination of debt and equity. The equity component of approximately USD 19 billion is

> expected to be raised through an issuance of mandatory convertible bonds and through a rights issue with subscription rights. ***Bridge financing for USD 57 billion is committed by BofA Merrill Lynch***, ***Credit Suisse*** ….
>
> * * *
>
> **Advisors to the Transaction**
>
> ***BofA Merrill Lynch and Credit Suisse are acting as lead financial advisors and structuring banks to Bayer in addition to providing committed financing for the transaction***.

Chang Aff. ¶17 & Ex. 14 at 4–5.

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 book riders" for the $15 billion note offering and the $8 billion common stock rights offering and the Euro Bond Offering, ***listing their offices as located in Manhattan***. Chang Aff. Ex. 15 at 1–2; id. Ex. 16 at 1–3; *see also* ¶202.

Whatever corporate shell game the Banks are now trying to play cannot result in dismissal of the verified SAC without discovery and without ***tracing the $700 million in fees the Banks and their syndicates pocketed***.[8] In the unlikely event that it turns out that it was some other as yet unidentified financial institutions that "influenced" the Bayer Defendants and "induced" them to undertake and close the "Worst Acquisition in History," that is an issue for summary judgment—not for a motion to dismiss.

The Banks' "retention" documents are self-contradictory with respect to dispute resolution. One calls for German law and non-exclusive German jurisdiction. Another for Singapore law and exclusive jurisdiction there. A third for German law and exclusive

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[8] *Stone Ridge Country Props. v. Mohonk Oil Co.*, 84 A.D.3d 1556 (3d Dep't 2011) (where a corporate parent's involvement is alleged "paraphernalia of incorporation" may be ignored). The Bank's responsibility is an issue of fact. *Goodspeed v. Hudson Sharp Mach. Co.*, 105 A.D.3d 1204 (3d Dep't 2013); *Hartshorne v. Roman Catholic Diocese*, 68 Misc. 3d 849 (Sup. Ct. Schenectady Cnty. 2020).

jurisdiction. Bayer chimes in with GSCA §148 and BA3 claiming they require Plaintiffs to go to Germany to ask permission to sue.

No one disputes the application of German substantive corporate law here. But this warren of conflicting choice-of-law and purported jurisdictional provisions—exclusive or nonexclusive—***confirm the wisdom of NY's core rules for international commercial litigation***, ***including derivative actions involving "foreign corporations" over which NY courts have subject-matter jurisdiction via BCL §§626/1319, as detailed in Plaintiffs' Standing Brief at 14–20***.

- NY courts' subject-matter jurisdiction—here via BCL §§626/1319—over derivative suits involving foreign corporations ***is inviolable and cannot be ousted or blocked by foreign statutes or private action***. This statutory scheme overrides the common-law internal-affairs doctrine.
- NY policies apply and control in determining these issues. NY courts decide what law is substantive or procedural.
- NY courts apply NY's "gatekeeper" rules (BCL §§626/627) to derivative suits on behalf of foreign corporations, and its procedural rules (the NY Civil Practice Law & Rules) to the prosecution of those suits in its courts.

Despite Defendants' attempts to make this seem complex, the legal rules are straightforward. BCL §§626/1319 create subject-matter jurisdiction that cannot be blocked by legislation, private agreement or unilateral action. BCL §§626/627 set forth the gatekeeper rules, including standing, share ownership and pre-suit demand requirements for derivative suits, involving foreign corporations doing business in NY. German substantive law applies (GSCA §117) to determine the Banks' liability.

B. Bayer's Supervisors Ignored the Banks' Prior Dishonest and Illegal Conduct, Including Major Due Diligence Failures in Their Own Acquisitions, in Selecting Them to Protect Bayer and Its Shareholders in the Monsanto Acquisition

Competent, ***honest bankers*** operating with independence and without conflicts had to be utilized to assure proper due diligence into Monsanto was performed so that Bayer and its shareholders were protected. ***Without doing an adequate evaluation***, the Supervisors used BofA and CS as advisors/financers on terms that created ***conflicts of interest*** and ***compromised their independence***. ¶¶175, 178–179. The Bayer Defendants failed to take steps to obtain information to provide "***good reason***" to assure that they were acting on the basis of "***adequate information for the benefit of the company***" in utilizing the Banks for those critical tasks. GSCA §93(1). They did no such review or evaluation. The Supervisors blindly accepted the Banks put forth by Baumann and Wenning, who they knew were strong advocates of the deal ***the departing CEO had opposed***, ***and quit rather than go along with***. ¶¶131–132.

The best indicator of how an organization will perform is whether its past conduct shows competent, ethical and legally-compliant behavior in its own affairs, *i.e.*, the Banks' record for conducting due diligence in their ***own past acquisitions and in rendering services to other clients***. It would be difficult to find banks with such records of incompetence. The Banks' dishonest, illegal acts over two decades resulted in damages to their clients and billions of dollars in fines and losses to their own shareholders. ¶¶103–113, 115–132.

The Banks' ***records of improper and illegal conduct***, ***conflicts of interest and dishonest dealings*** created significant doubt as to whether or not they were committed to—or capable of—honest and legally-compliant behavior or could be trusted to act ***in***

Bayer's best interests as opposed to the interests of management who hired them and promised them extraordinarily large fees if—but only if—the deal they wanted to entrench themselves closed. The Banks' track records show ***over $100 billion*** in fines and losses to corporations, shareholders, clients and third parties. This should have been weighed by Bayer's Supervisors—***especially in light of the conflicting compensation arrangements***, and resulted in the hiring of more competent, honest and ethical banks, compensated—at a minimum—for due diligence work on non-conflicted terms. *Id.*

Even a cursory review would have revealed BofA/CS's checkered pasts. ¶¶103–132. BofA had been involved in ***two failed acquisitions that should have been warnings to Bayer's Supervisors***. In 2008–2009, BofA acquired Countrywide in the "***worst deal in the history of American finance***," and Merrill Lynch in a deal that set "***the land speed record for disaster***"—until the Monsanto acquisition that is. The corrupt business practices/products of these ***acquired entities*** (here, Monsanto) made BofA the symbol of the excesses of the great financial meltdown of 2008–2009 and caused BofA over $50 billion in losses. ¶107.

In January 2011, BofA paid $13 billion to Fannie Mae and Freddie Mac for Countrywide's sale of toxic sub-prime loans to them and $17 billion to the U.S. Department of Justice ("DOJ") for selling toxic sub-prime securities. BofA was one of the five mortgage servicers that paid $25 billion due to its loan-servicing and foreclosure abuses. BofA paid $1.7 billion for misleading bond insurers about the quality of toxic subprime mortgages, and over $2.5 billion to shareholders they had lied to about the Merrill acquisition. ¶¶104, 107–110, 113. ***Both disastrous acquisitions were the result***

of BofA's inadequate due diligence into the practices, products, and potential liabilities of the acquired entities (***which is similar to what happened with Monsanto***). ¶104.

This ***pattern*** of misconduct by BofA extends ***beyond*** its own failed acquisitions. BofA cheated both customers and third parties. BofA was caught stealing customers' dormant accounts via ***illegal service charges***, and later caught stealing again—this time as bond trustee for California—"***a truly astonishing pattern of utterly brazen thievery***." Due to similar misdeeds, BofA agreed to pay over $200 million because it had stolen from trust beneficiaries. ¶¶104–105. In 2016, Merrill Lynch paid $415 million for misusing client cash to trade for its own benefit. ¶¶107, 113. After acquiring FleetBoston, BofA paid $675 million due to improper mutual fund trading practices. It also paid $490 million because it concealed huge trading losses before its NationsBank takeover. ¶106. BofA paid $727 million for cheating credit card customers. ¶113. ***BofA even paid $520 million for assisting the corporate criminals Enron and Worldcom—working as their bankers, in cahoots with the most notorious corporate miscreants in history***. ¶106.

Same story with CS. CS acquired NY-based Donaldson, Lufkin & Jenrette ("DLJ"), without doing adequate due diligence, resulting in large losses for CS's shareholders. The misdeeds of the acquired entity (here, Monsanto) cost CS billions. CS paid $100 million for cheating customers in "hot" IPOs, and CS executives were charged with conflicts of interest and ***permanently banned*** from the industry. CS shared a $1.4 billion penalty personally for IPO ***conflicts of interest***. Later, CS took a multi-billion dollar write down on the DLJ acquisition, reporting hundreds of millions in losses. *See* ¶121.

CS also had a record of serious legal violations and cheating its customers/clients. ¶¶115, 117. CS pleaded ***guilty to a criminal charge of tax-evasion conspiracy*** in federal court and paid a penalty of $2.6-plus billion. ¶¶117, 130. CS paid $6-plus billion to the DOJ for its sale of toxic securities that CS officials called "***complete crap***" "***sludge***" and "***utter and complete garbage***," sales made by what the NYAG said were "***false and irresponsible representations***." ¶¶117, 126, 130. CS also paid $536 million and entered into a deferred prosecution agreement to settle accusations by U.S. government ***and*** NY authorities that it violated laws prohibiting dealings with customers in Iran and Sudan.[9] ¶125.

The pattern and practice of bad behavior by both these Banks involved violations of law ***to enrich themselves at the expense of those to whom they owed duties of care***, ***honesty and loyalty***. ¶¶131–132. It would be difficult to find banks with such records of incompetence, dishonesty and illegality costing their own shareholders, clients and third

[9] CS has also been embroiled in a long series of perhaps less eye-popping violations, but nevertheless serious misconduct (¶¶120, 122–126):

- Japan: criminal conviction and $4 million fine, for helping companies conceal losses and for destroying evidence;
- U.S.: $12.5 million for helping WorldCom sell worthless bonds;
- U.S.: $14 million in NASD/FINRA fines for violations involving conflicts of interest;
- Italy: $200 million for assisting the fraudulent Parmalat enterprise which created Italy's biggest bankruptcy;
- U.S.: $85 million to NYAG for illegally operating "dark pools";
- U.S.: $90 million to SEC—lied about the performance of its wealth management business; and
- Germany: $170 million for helping clients hide assets and evade German taxes.

parties ***over $100 billion in fines***, ***penalties and payments***. ***Conduct like this gave rise to the term*** "***Banksters***." And it is why punitive damages are sought from the Banks in this case. Yet, it was these Banks that the Supervisors went forward with, ***on conflicted terms***, working with Wenning and Baumann, who were pushing the Monsanto Acquisition, despite having "muffed" the Merck/Conceptus deals—Bayer's two prior U.S. acquisitions—with inadequate due diligence.

These Banks were supposed to be worldly financial sophisticates, experienced and knowledgeable in the special risks of cross-border cross-cultural deals with ***due-diligence expertise***. That is what supposedly justified their huge fees.

> Mergers and acquisitions are arguably the most important decision that a company makes. Mergers can … destroy billions of dollars of value. Daimler Benz–Chrysler, Sprint–Nextel, Quaker Oats–Snapple, AOL–Time Warner are just four examples, but the list is virtually endless. Indeed, around half of M&A deals end up destroying value for acquirers.
>
> The risk of substantial value destruction is compounded by the fact that CEOs typically lack expertise in M&A, since they make such decisions rarely. As a result, they seek advice from investment banks. Given the banker expertise required, and the importance of getting the M&A decision right, this advice commands very high fees—as a result, M&A is an extremely lucrative career ….
>
> * * *
>
> Thus, there is enormous potential for conflicts of interest. If a client asks a bank to execute a deal that the bank believes to be bad, it may undertake it anyways since, the bank receives millions irrespective of whether the deal actually creates value. Not only may this lead banks to (receptively) accept value-destructive mandates, but they may (actively) pitch value-destructive mandates.

Alex Edmans (London Business School), *Conflicts of Interest Among M&A Advisors*, ALEX EDMANS BLOG, *available at* https://alexedmans.com/blog/corporate-finance/conflicts-of-interest-among-ma-advisors/ (last visited Apr. 12, 2021).

These Banks knew German corporations had a terrible record in cross-cultural/border acquisitions, especially involving competitors where, as here, the ability to conduct due diligence was restricted. ¶162.

- In 1998, Daimler Benz acquired competitor Chrysler for $36 billion, later taking a $35 billion loss in one of the worst acquisition disasters in history, attributed to inadequate due diligence due to antitrust restrictions.
- In 1999, Deutsche Bank acquired competitor Bankers Trust of New York and later wrote off and lost billions due to that failed acquisition.
- In 1994, BMW acquired Rover—an English company. The acquisition failed. BMW sold Rover for a pittance.
- In 1986, Volkswagen AG acquired manufacturer SEAT S.A. The acquisition failed due to a lack of due diligence, resulting in a $2.2-billion loss.

Cross-border/cultural acquisitions had proven to be especially dangerous and harmful to non-German corporations as well. ¶163.

- In 2007, Royal Bank of Scotland acquired Dutch competitor ABN/AMRO—a "horrendously damaging acquisition." RBS lost billions.
- In 2011-2012, Hewlett Packard acquired Autonomy and later wrote off $9 billion—a disastrous acquisition due to inadequate due diligence.
- Toshiba acquired Westinghouse—a competitor—for $4.2 billion. The acquisition was a disaster. Toshiba sold Westinghouse, wrote off $6.3 billion.
- HSBC of England acquired U.S.-based Household Finance. The $15 billion acquisition was a disaster. HSBC wrote off $17 billion.

- In 2000, France Telecom acquired Orange, an English competitor for $45 billion, suffering billions of dollars in losses when that acquisition failed.

Even when large acquisitions are not plagued by cross-cultural/border issues, they still often fail due to inadequate due diligence. ¶164.

- In 2008, Allianz acquired Dresdner Bank without doing adequate due diligence. The acquisition failed. Allianz wrote off $3 billion.
- In 2000, Time Warner acquired AOL for $111 billion. The acquisition was a failure due to inadequate due diligence. Time Warner suffered $100 billion in write offs and losses.
- In 2004, HP acquired competitor Compac Computer for $25 billion. The acquisition was a disaster because of inadequate due diligence, resulting in huge losses—the "dumbest deal of the decade."
- In 2014, Microsoft acquired Nokia for $7.9 billion and wrote off $7.6 billion due to that disastrous acquisition caused by inadequate due diligence.
- In 2006, Alcatel acquired Lucent for $13.4 billion. The acquisition failed due to inadequate due diligence. Alcatel suffered massive losses.
- In 2005, Sprint acquired Nextel for $36 billion. The acquisition was a disaster due to inadequate due diligence. Sprint suffered massive losses.

Given their financial conflicts, compromised independence, long history of their own failed acquisitions and the risk-exacerbating circumstances surrounding this Acquisition, the Banks failed to perform adequate due diligence, which damaged Bayer and its shareholders. ¶¶27, 50–52, 131–132, 208–209.

C. Bayer's Supervisors Allowed the Banks to Operate on Terms Depriving Them of Independence, Leaving Them Financially Conflicted "Cash-out" Partners in Closing the Monsanto Acquisition, Regardless of the Consequences to Bayer and Its Shareholders

The Banks were conflicted and their independence was comprised from the outset. 100% of their fees, one of the largest investment banking hauls ever, were completely contingent on the Acquisition closing. ¶¶50–52, 203–205, 207. ***No closing—no payday***.

In addition to a huge ($100-plus million) advisory/due diligence fee, itself ***incredibly contingent on closing***, the Banks were promised that they would arrange the financing for the Acquisition—***over $60 billion in bridge loans***, ***securities offerings and refundings that would net these Banks $700 million—again contingent on the deal closing***. ***All these fees would be realized by the Banks—only if the Acquisition closed***. ¶¶50–52, 202–204, 207.

Things worked out great for the Banks. ***After the deal closed***, ***the Banks pocketed their due diligence fees***, ***and the fees from the Acquisition Financings***. ¶¶50–52, 273–274. The Banks' NY offices financed the closing with ***the largest bridge loan in history***, $60-plus billion. Then, to raise funds to pay back their huge loan, they assisted Bayer in raising billions of dollars via securities offerings. They did a $15-billion Reg 144A Bond issuance in the U.S., and a 75 million shares ($8 billion) in a "rights offering" to Bayer's existing shareholders, ***raising billions more***. They did a $5-billion Euro bond offering, and did a ***$4 billion*** Bayer convertible-equity offering, and ran transactions whereby new Bayer bonds were exchanged for ***$6 billion of Monsanto debt***. *Id.*

The contingent compensation arrangements created a conflicting incentive to ***avoid*** digging down into Monsanto's litigations and liabilities. If the Banks did

independent, skeptical due diligence and reported the truth, the deal would not have closed, and they would not get their fees. ***Doing the proper thing to protect Bayer and its shareholders would have cost the Banks hundreds of millions of dollars***. ***They were in a clear financial conflict***. ¶198.

By paying cash and not issuing Bayer shares, Defendants had structured the Acquisition to avoid a Bayer shareholder vote. ¶219. Many shareholders opposed the all-cash debt-financed Acquisition. The Banks knew that they would have to sell billions of new Bayer securities to finance the all-cash Acquisition—including ***repaying their own gigantic risky and highly profitable bridge loan, the largest ever***. They needed to prime the securities market by creating investor "***demand***" for these securities offerings which would generate the fees they had been promised, and pay down their huge and very risky bridge loan. ***Defendants were highly motivated to create investor demand for Bayer's equity and debt securities and for refinancing Monsanto's debt.*** ¶¶202–205. Faced with this skepticism and the need to access the capital markets, Defendants undertook a worldwide "***sales job***" to present the Acquisition as "***low risk***" which would ***create "substantial shareholder value***." ¶¶205–206, 223–225.

Defendants told investors the Acquisition was a "***transformative step***" bringing "***significant value creation***" and "***accretive in the first year with the potential for premium valuation of combined agricultural business***." ¶224. By participating in these "***sell-the-deal***" conferences which minimized the risks, and trumpeted the benefits of the Acquisition, the Banks abandoned any pretense of independence in ***objectively*** pursuing a ***thorough*** due diligence investigation into Monsanto ***looking to uncover facts contradicting the positive assurances made in the "sales job" presentations they were***

helping orchestrate—including here in NY to NY investors and NY-based Bayer shareholders. ¶¶205–206, 273–274.

The "contingent" compensation arrangements and the Banks' "sell-the-deal" activities made the Banks economic partners in the ***closing of the deal***—and "***cash out partners***" at that. ¶207. ***If the Banks* "*blew*" *the deal as a result of effective and honest due diligence they would get paid nothing for over three years of effort***. ¶204. However, this way they would pocket hundreds of millions of dollars when the deal closed, regardless of what happened to Bayer or to Bayer's stockholders after the Acquisition, including the Roundup cancer lawsuits and Monsanto's Dicamba and legacy toxic tort liabilities. ¶52.

The Banks' conflicts were exacerbated ***by the long unanticipated delay in closing the Acquisition in June 2018***. The Banks—and their executives—had anticipated harvesting these huge fees by year end 2017, and were upset about the delay in closing. ***No closing would mean no pay after three years of effort***. ¶204.

This was the most luscious investment banking take in history. ***It provided desperately needed revenue to these Banks' investment banking operations***. ¶¶200–205. The importance of these fees—to BofA and CS—is difficult to overstate. According to CS, "this was one of the largest mergers and acquisition deals of all time" a "deal that was mammoth in all ways." ¶200. As reported in the financial press, "Bayer's $66 million takeover of Monsanto is the largest buyout in history …[, and] [t]he deal means a quarterly windfall for Credit Suisse's ailing investment bank." *Credit Suisse Snags Fees in Record M&A Deal*, FINEWS.CH, Sept. 14, 2016, *available at* https://www. finews.com/news/english-news/24438-bayer-monsanto-mergers-acquisitions-investment-

banks-fees-credit-suisse-bofa-merrill (last visited Apr. 12, 2021); *see also* Bob Bryan, *Wall Street Banks Could Make Close to $700 Million from the Bayer Monsanto Deal*, BUSINESS INSIDER, Sept. 14, 2016.

No one on the investment banking teams was incentivized to obtain or report negative information about the Roundup lawsuits, Dicamba claims or Monsanto's legacy toxic-tort liabilities. *See*, *e.g.*, ¶¶183, 204. To the contrary, the Banks wanted the deal to close so they could get the fees. These conflicts prevented the Banks ***and their bankers*** from using independent and skeptical ***judgment in investigating and presenting the true risks posed to Bayer and its shareholders by the Monsanto Acquisition***. ¶¶27, 50–52, 197–209.

When push came to shove, instead of doing the right thing, the Banks helped Bayer close the Acquisition, did the billions in Acquisition Financings, took their money and exited stage left. Bayer and its shareholders were left to deal with the deal, when it—***as Defendants had been warned—immediately*** turned into a "***Frankenstein Monsanto***." *See* Standing Br. at 8.

D. The Financially Conflicted Banks Violated GSCA §117 by Influencing and Inducing Bayer, Bayer's Supervisors and Managers to Act to the Detriment of Bayer and Its Shareholders, While Pocketing Hundreds of Millions of Dollars for Themselves

Under §117 the Banks were forbidden to "exert influence on the company"—"inducing a member of the management board on the Supervisory Board to act to the disadvantage of the company or its shareholders," and are "liable to the company for any resulting damage if they did so." GSCA §117 does not require any contractual relationship with the company. It is a tough liability statute, different from U.S. corporation codes and securities laws which do not have such explicit

aiding/abetting/conspiracy/joint and several liability provisions—with express liability to the company. This Court is familiar with this legal terrain. *In re Renren Inc. Derivative Litig.*, 2020 N.Y. Misc. LEXIS 2132, at **100–02 (Sup. Ct. N.Y. Cnty. May 20, 2020) (investment banker advisors can be liable under English law for acting as knowing accessories to corporate insiders' breaches of duty).

The SAC's allegations that the Banks ***influenced and induced*** the Company and its Supervisors to act are detailed. *See*, *e.g.*, ¶¶197–209. Financially conflicted and having abandoned any pretense of independence, the Banks (and Bayer's NY lawyers) ran the Monsanto Acquisition—out of their NY offices where they put the final details together in September 2016 and closed it in June 2018 at S&C's Broad Street NY office. They helped structure the deal to act as a "poison pill" to make Bayer "unacquirable" and entrench Bayer's insiders. They never sounded the alarm on Monsanto despite its horrible past and current problem—the latter of which was getting worse by the day as the closing approached. The Banks—which had received no fees for some three years of work and would get none at all, if the deal did not close—okayed the Supervisors' horrible bet to close. They then immediately hit the NY financial markets with billions in securities issuances to raise the cash to pay off their risky but hugely profitable "bridge loan," and pay the fees that they would pocket. ¶¶27, 50–52, 197–209. Although nothing in GSCA §117 requires the showing of a financial conflict, lack of independence, motive, intent or knowledge ("scienter"), those incriminating facts are alleged as to the Banks, from whom punitive damages are sought.

The dishonesty of financially conflicted Banks who profit by assisting defaulting corporate fiduciaries is a worldwide problem. The U.S. legal system—most exposed to

this corruption of the capital markets by Wall Street banks—has been evolving and refining legal doctrines to deal with this troublesome phenomenon of investment bankers who knowingly assist insiders in breaching fiduciary duties to the corporation and/or its owners/shareholders, holding they can be liable to both.

> Investment Bankers or M&A advisors, are often given the opportunity to extract wealth at their clients' expense, which creates a conflict of interest and incentives disloyalty towards the clients.
>
> ***
>
> ***An all-or-nothing success fee gives the banker an incentive to push for any deal at the expense of a good deal***. ...
>
> Conflicted investment bankers can harm the client by "lead[ing] buyers to pay more than they otherwise would or to enter into wealth-destroying deals they otherwise would avoid …," Put simply, when a director approaches an investment banker to advise him and his company on a proposed M&A deal, the investment banker will often advise the director to proceed with the deal, even if it would not be in the company's best interest, ***because the investment banker knows if he says "no deal," he will not receive any commission***.
>
> Economic damage to corporations and the corporation's shareholders clearly justified searching for and implementing a proper fix- one that sufficiently deters harmful disloyalty. ***A new solution, which has surfaced in the Delaware Court of Chancery through three recent years***, ***is holding disloyal investment bankers civilly liable for aiding and abetting corporate directors in breaching their fiduciary duties to shareholders***.

Maren Worley, *Holding Investment Bankers Liable for Aiding and Abetting Corporate Directors, the Under-Deterrent*, 32 BYU JOURNAL OF PUBLIC LAW 155, 156 (2017);[10] *see also* William W. Bratton & Michael L. Wachter, *Bankers and Chancellors*, 93 TEX. L.

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[10] *See also*, *e.g.*, *In re Del Monte Foods Co. S'holders Litig*., 25 A.3d 813, 818 (Del. Ch. 2011); *In re El Paso Corp. S'holder Litig*., 41 A.3d 432, 448 (Del. Ch. 2012); *In re Rural Metro Corp. Stockholders Litig*., 88 A.3d 54, 63 (Del. Ch. 2014).

REV. 1, 27 (2014).[11]

In an *en banc* decision, *RBC Capital Markets, LLC v. Jervis*, 129 A.3d 816 (Del. 2015), the Delaware Supreme Court upheld the liability of RBC Capital Markets for aiding and abetting breaches of fiduciary duty by directors of Rural Metro Corporation. Banker compensation that was only partially contingent on closing the deal was a focus:

> [W]ith the exceptions of the fairness opinion fee and termination fee, ***the fees that RBC and Moelis were to receive were contingent upon the Company consummating a transaction***.
>
> * * *
>
> The Board[] took no steps to address or mitigate RBC's conflicts.
>
> * * *
>
> While a board may be free to consent to certain conflicts, and has the protections of 8 DEL. C. § 141(e), directors need to be active and reasonably informed when overseeing the sale process, including identifying and responding to actual or potential conflicts of interest. … A board's consent to a conflict does not give the advisor a "free pass" to act in its own self-interest and to the detriment of its client.

Id. at 839, 855. The same reasoning applies here, requiring a finding of liability on the part of the Banks.

III. CONCLUSION

For the reasons set forth above, the Court should deny the Bank Defendants' motion to dismiss the verified SAC.

Dated: New York, New York
April 13, 2021

Respectfully submitted,

s/ Clifford S. Robert
Clifford S. Robert

[11] *See also*, *e.g.*, *In re Atheros Commc'ns, Inc. S'holder Litig*., 2011 WL 864928, at **8–9, 14 (Del. Ch. Mar. 4, 2011) (enjoining the vote, in part, because the specifics of the contingency fee were not disclosed, including the percentage of the fee that was contingent on the success of the deal); *La. Mun. Police Emps. Ret. Sys. v. Crawford*, 918 A.2d 1172, 1190–92 (Del. Ch. 2007) (enjoining the vote for failing to disclose the fact that a significant portion of the bankers' fees rested upon initial approval of a particular transaction).

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Certification Pursuant to Commercial Division Rule 17

The undersigned certifies that the foregoing memorandum complies with Rule 17 of Section 202.70 (Rules of the Commercial Division of the Supreme Court). The undersign further certifies that the memorandum was prepared using Microsoft Word (Times New Roman typeface at 12 points with double-spacing), and that, based on the word-count function of Microsoft Word, the memorandum contains 6,575 words, excluding the caption, prefatory tables, and the signature block.

Dated: New York, New York
April 13, 2021

s/ Clifford S. Robert
Clifford S. Robert

Addendum A

[Texts of Sections 91, 93, 111, 116, 117, and 148 of the German Stock Corporation Act (*Aktiengesetz*), English translation as at May 10, 2016 by Norton Rose Fulbright.]

§ 91 Organisation; Accounting

(1) The management board shall ensure that the requisite books of account are maintained.

(2) The management board shall take suitable measures, in particular surveillance measures, to ensure that developments threatening the continuation of the company are detected early.

§ 93 Duty of Care and Responsibility of Members of the Management Board

(1) [1]In conducting business, the members of the management board shall employ the care of a diligent and conscientious manager. [2]They shall not be deemed to have violated the aforementioned duty if, at the time of taking the entrepreneurial decision, they had good reason to assume that they were acting on the basis of adequate information for the benefit of the company. [3]They shall not disclose confidential information and secrets of the company, in particular trade and business secrets, which have become known to the members of the management board as a result of their service on the management board. [4]The duty referred to in sentence 3 shall not apply with regard to a recognized auditing agency pursuant to § 342b of the Commercial Code within the scope of the audit.

(2) [1]Members of the management board who violate their duties shall be jointly and severally liable to the company for any resulting damage. [2]They shall bear the burden of proof in the event of a dispute as to whether or not they have employed the care of a diligent and conscientious manager. [3]If the company takes out an insurance covering the risks of a member of the managing board arising from his work for the company, such insurance should provide for a deductible of no less than 10 per cent of the damage up to at least an amount equal to 1.5 times the fixed annual compensation of the managing board member.

(3) The members of the management board shall in particular be liable for damages if, contrary to this Act:

1. contributions are repaid to shareholders;
2. shareholders are paid interest or dividends;
3. own shares or shares of another company are subscribed, acquired, taken as a pledge or redeemed;
4. share certificates are issued before the issue price has been paid in full;
5. assets of the company are distributed;
6. payments are made contrary to § 92 (2);

7. remuneration is paid to members of the supervisory board;

8. credit is granted;

9. in connection with a conditional capital increase, new shares are issued other than for the specified purpose or prior to full payment of the consideration.

(4) [1]The members of the management board shall not be liable to the company for damages if they acted pursuant to a lawful resolution of the shareholders' meeting. [2]Liability for damages shall not be precluded by the fact that the supervisory board has consented to the act. [3]The company may waive or compromise a claim for damages not prior to the expiry of three years after the claim has arisen, provided that the shareholders' meeting consents thereto and no minority whose aggregate holding equals or exceeds one-tenth of the share capital records an objection in the minutes. [4]The foregoing period of time shall not apply if the person liable for damages is insolvent and enters into a settlement with his creditors to avoid or terminate insolvency proceedings.

(5) [1]The claim for damages of the company may also be asserted by the company's creditors if they are unable to obtain satisfaction from the company. [2]However, in cases other than those set out in (3), the foregoing shall apply only if the members of the management board have manifestly violated the duty of care of a diligent and conscientious manager; (2) sentence 2 shall apply accordingly. [3]Liability for damages with respect to the creditors shall be extinguished neither by a waiver nor by a compromise of the company nor by the fact that the act that has caused the damage was based on a resolution of the shareholder's meeting. [4]If insolvency proceedings have been instituted over the company's assets, the receiver in insolvency shall exercise the rights of the creditors against the members of the management board during the course of such proceedings.

(6) For companies that are listed on a stock exchange at the point in time of the violation of duty, claims under the foregoing provisions shall be time barred after the expiration of a period of ten years; for other companies, claims under the foregoing provisions shall be time barred after the expiration of a period of five years.

§ 111 Duties and Rights of the Supervisory Board

(1) The supervisory board shall supervise the management of the company.

(2) [1]The supervisory board may inspect and examine the books and records of the company

as well as the assets of the company, in particular cash, securities and merchandise. [2]The supervisory board may also commission individual members or, with respect to specific assignments, special experts, to carry out such inspection and examination. [3]It shall instruct the auditor as to the annual financial statements and consolidated financial statements according to § 290 of the Commercial Code.

(3) [1]The supervisory board shall call a shareholder's meeting whenever the interests of the company so require. [2]A simple majority shall suffice for such resolution.

(4) [1]Management responsibilities may not be conferred on the supervisory board. [2]However, the articles or the supervisory board have to determine that specific types of transactions may be entered into only with the consent of the supervisory board. [3]If the supervisory board refuses to grant consent, the management board may request that a shareholders' meeting approve the grant. [4]The shareholders meeting by which the shareholders' approves shall require a majority of not less than three-fourths of the votes cast. [5]The articles may neither provide for any other majority nor prescribe any additional requirements.

(5) [1]The supervisory board of a company which is listed on a stock exchange or subject to co-determination determines target ratios for the percentage of women in the supervisory board and in the management board. [2]If the percentage of women is below 30 per cent upon determination of the target ratios, the target ratios may not be lower than the rate already achieved. [3]Concurrently, time periods for attaining the target ratios shall be set. [4]The periods shall not exceed five years. [5]If there already is a ratio pursuant to § 96 (2) which applies to the supervisory board, the determination shall only be made for the management board.

(6) Members of the supervisory board may not confer their responsibilities on other persons.

§ 116 Duty of Care and Responsibility of Members of the Supervisory Board

§ 93 on the duty of care and responsibility of members of the management board shall, with the exception of (2) sentence 3, apply accordingly to the duty of care and responsibility of the members of the supervisory board. [2]The supervisory board members are particularly bound to maintain confidentiality as to confidential reports received or confidential consultations. [3]They are in particular liable for damages if they determine unreasonable remuneration (§ 87 (1)).

Section Three. Exertion of Influence on the Company

§ 117 Liability for Damages

(1) [1]Any person who, by exerting his influence on the company, induces a member of the management board or the supervisory board, a registered authorised officer (*Prokurist*) or an authorised signatory to act to the disadvantage of the company or its shareholders shall be liable to the company for any resulting damage. [2]Such person shall also be liable to the shareholders for any resulting damage insofar as they have suffered damage in addition to any loss incurred as a result of the damage to the company.

(2) [1]In addition to such person, the members of the management board and the supervisory board shall be jointly and severally liable if they have acted in violation of their duties. [2]They shall bear the burden of proof in the event of a dispute as to whether or not they have employed the care of a diligent and conscientious manager. [3]The members of the management board and the supervisory board shall not be liable to the company or the shareholders for damage if they acted pursuant to a lawful resolution of the shareholders' meeting. [4]Liability for damages shall not be precluded by the fact that the supervisory board has consented to the act.

(3) In addition to such person, any person who has wilfully caused undue influence to be exerted shall also be jointly and severally liable to the extent that he has obtained an advantage from the detrimental act.

(4) § 93 (4) sentences 3 and 4 shall apply accordingly to the extinguishment of liability for damages to the company.

(5) [1]The claim for damages of the company may also be asserted by the company's creditors if they are unable to obtain satisfaction from the company. [2]Liability for damages with respect to the creditors shall be extinguished neither by a waiver nor by a compromise of the company nor by the fact that the act that has caused the damage was based on a resolution of the shareholder's meeting. [3]If insolvency proceedings have been instituted over the company's assets, the receiver in insolvency shall exercise the rights of the creditors during the course of such proceedings.

(6) Claims under the foregoing provisions shall be time barred after expiration of a period of five years.

(7) The foregoing provisions shall not apply if the member of the management board or the supervisory board, the registered authorised officer (*Prokurist*) or the authorised signatory was induced to engage in the act causing damage by the exercise of:

1. the right to direct under a control agreement; or

2. the right to direct of an acquiring company (§ 319) into which the company has been integrated.

§ 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.

Addendum B

[Texts of Sections 626, 627, 1319, and 1320 of the New York Business Corporation Law.]

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.

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NY CLS Bus Corp § 627

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)

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

In any action specified in section 626 (Shareholders' derivative action brought in the right of the corporation to procure a judgment in its favor), unless the plaintiff or plaintiffs hold five percent or more of any class of the outstanding shares or hold voting trust certificates or a beneficial interest in shares representing five percent or more of any class of such shares, or the shares, voting trust certificates and beneficial interest of such plaintiff or plaintiffs have a fair value in excess of fifty thousand dollars, the corporation in whose right such action is brought shall be entitled at any stage of the proceedings before final judgment to require the plaintiff or plaintiffs to give security for the reasonable expenses, including attorney's fees, which may be incurred by it in connection with such action and by the other parties defendant in connection therewith for which the corporation may become liable under this chapter, under any contract or otherwise under law, to which the corporation shall have recourse in such amount as the court having jurisdiction of such action shall determine upon the termination of such action. The amount of such security may thereafter from time to time be increased or decreased in the discretion of the court having jurisdiction of such action upon showing that the security provided has or may become inadequate or excessive.

History

Add, L 1961, ch 855; amd, L 1962, ch 834, § 43, eff Sept 1, 1963; L 1965, ch 803, § 23 eff Sept 1, 1965.

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NY CLS Bus Corp § 1319

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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.

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NY CLS Bus Corp § 1320

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

§ 1320. Exemption from certain provisions

(a) Notwithstanding any other provision of this chapter, a foreign corporation doing business in this state which is authorized under this article, its directors, officers and shareholders, shall be exempt from the provisions of paragraph (e) of section 1316 (Voting trust records), subparagraph (a)(1) of section 1317 (Liabilities of directors and officers of foreign corporations), section 1318 (Liability of foreign corporations for failure to disclose required information) and subparagraph (a)(4) of section 1319 (Applicability of other provisions) if when such provision would otherwise apply:

(1) Shares of such corporation were listed on a national securities exchange, or

(2) Less than one-half of the total of its business income for the preceding three fiscal years, or such portion thereof as the foreign corporation was in existence, was allocable to this state for franchise tax purposes under the tax law.

History

Add, L 1962, ch 834, § 102, eff Sept 1, 1963; amd, L 1962, ch 819; L 1963, ch 684, § 9, eff Sept 1, 1963.

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