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

Plaintiffs' Memorandum of Law in Opposition to the Bayer AG's Motion to Dismiss the Verified Shareholder Derivative Complaint Based on the Internal-Affairs Doctrine and Lack of Standing to Sue

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I. INTRODUCTION AND OVERVIEW

Plaintiffs—owners of 2,317 shares of Bayer AG ("Bayer") common stock—bring their verified complaint ("SAC")[1] derivatively on behalf of Bayer, a corporation organized under the German Stock Corporation Act ("GSCA"),[2] asserting breach-of-fiduciary-duty claims against Bayer's Supervisors (Directors), its two top Managers (Officers) (together, the "Bayer Defendants") and related claims against two banks (BofA Securities, Inc./Bank of America Corp. ("BofA") and Credit Suisse Group AG/Credit Suisse AG ("CS")) (together, the "Banks"). The Bayer Defendants breached their duties, *i.e.*, the "***care of a diligent and conscientious manager***," in connection with Bayer's disastrous $66-billion all-cash acquisition (the "Acquisition") of Monsanto Company ("Monsanto"). In connection with the Acquisition, the Bayer Defendants acted in their own interests and against Bayer's interests, seeking entrenchment by making Bayer virtually impervious to hostile takeover, and they acted without adequate information as to the risks involved. Bayer's counter-narrative of an "entrepreneurial decision" gone awry improperly ignores these well-pleaded allegations.

As alleged in the SAC, Monsanto—whose "***dismal reputation***" was well known—had a long history of scandals, paying billions of dollars to settle lawsuits involving the cancer-causing products it sold:

> [*V*]***ilified for its genetically modified seeds and past products like Agent Orange and DDT***, [***Monsanto***] ***regularly anchors the bottom of the annual Harris Poll ranking of the reputations of 100 US***

[1] The allegations in the SAC (NYSCEF No. 35) are cited as "¶___." Unless otherwise noted, all emphases in quoted texts are added, and all internal citations are omitted.

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

> ***corporations***. ***And words like*** "***evil***," "***hated***" ***and*** "***dangerous***" ***pop up on the first page of a Google search of its brand name***.

¶5. By 2016, when Bayer made the deal, Monsanto was a much-reviled seller of the herbicide "Roundup," which used Glyphosate, a toxic chemical suspected of causing cancer and identified by the World Health Organization as a "***probable human carcinogen***." ¶21. Monsanto was already being sued by non-Hodgkin's lymphoma victims. ¶6. In June 2018, Bayer closed the deal, consummating the "***Worst Acquisition in History***." ¶¶9–20.

Moving to dismiss the well-pleaded SAC,[3] Bayer does not contest this Court's subject-matter jurisdiction. Bayer asserts, however, that Plaintiffs lack standing.[4] It argues that, under the internal-affairs doctrine, GSCA §148 establishes requirements for derivative standing, which Bayer says Plaintiffs do not meet. Bayer also argues that the GSCA requires Plaintiffs to ask the German court for permission to file this lawsuit. Neither argument has merit.

NY law governs the issue of standing. And, under NY law, Plaintiffs have standing. BCL §1319 provides that a "foreign corporation doing business in this state, its directors, officers and shareholders" are subject to §626, which in turn provides that a derivative "action may be brought in the right of a … foreign corporation to procure a

[3] 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 "Standing Brief," a "Personal-Jurisdiction Brief" and a "Banks Brief." Each opposition brief adopts in full all arguments made in the other briefs.

[4] On a motion to dismiss pursuant to CPLR §3211(a)(3), "the factual allegations … pertaining to plaintiff's capacity to sue must be accepted as true." *Lazar v. Merchs.' Nat'l Props., Inc.*, 45 Misc. 2d 235, 236 (Sup. Ct. N.Y. Cnty. 1964). "On a defendant's motion to dismiss the complaint based upon the plaintiff's alleged lack of standing, the burden is on the moving defendant to establish, *prima facie*, the plaintiff's lack of standing as a matter of law." *Berger v. Friedman*, 151 A.D.3d 678, 679 (2d Dep't 2017).

judgment in its favor, by a holder of shares or … of a beneficial interest in such shares." BCL §1319 is a choice-of-law statute that ***overrides*** the common-law internal-affairs doctrine, which turns to the law of the place of incorporation for rules regulating the internal affairs of a corporation.[5] BCL §§626/627 provide the "gatekeeper" rules for derivative lawsuits in NY, including standing to sue, stock-ownership and pre-suit-demand requirements for ***all*** corporations—foreign and domestic.

This statutory override of the internal-affairs doctrine finds express recognition in NY case law. In *Culligan Soft Water Co. v. Clayton Dubilier & Rice LLC*, the First Department expressly rejected the internal-affairs doctrine in favor of §§1319/626, holding that ***NY law*** "***governs the issue of plaintiffs' standing to bring a shareholder derivative action***" on behalf of "a foreign corporation doing business in [NY]":

> Nor does the internal[-]affairs doctrine apply to claims based on sections of the [BCL] enumerated in … §§1317 and 1319. [BCL] §1319(a)(1) expressly provides that … §626 (shareholders' derivative action) shall apply to a foreign corporation doing business in [NY]. ***Thus, the issue of plaintiffs' standing to bring a shareholder derivative action is governed by*** [***NY***] ***law***[.]

118 A.D.3d 422, 422–23 (1st Dep't 2014) (citing *Pessin v. Chris-Craft Indus., Inc.*, 181

[5] BCL Article 13 contains several choice-of-law provisions affecting foreign corporations. Some, like §1319, apply to all foreign corporations doing business in NY. Bayer may fairly be said to have been "doing business" in NY in connection with the Acquisition. For example, the Acquisition was negotiated (in part) in NY and closed in NY. Bayer used NY-based lawyers. The due diligence was primarily conducted in NY, by Bayer's NY-based agents (including BofA and CS). The Acquisition was financed largely in NY (including multi-billion-dollar bridge financing through NY and a $15 billion NY-centric note offering). Key financing agreements chose NY law and venue, and Bayer appointed an agent for service of process in NY. Finally, the deal was "blessed" in NY when the CEOs of Bayer and Monsanto met in Trump Tower with the then President-Elect to discuss government approval and to promise many American jobs. As to the latter, it is worth noting that Bayer has more employees, assets and shareholders in the U.S. than in Germany. *See* Personal-Jurisdiction Brief at 3–10.

A.D.2d 66, 70–71 (1st Dep't 1992)). Likewise, the Second Circuit in *Norlin Corp. v. Rooney, Pace, Inc.* deferred to the NY legislature's decision to apply NY's "business law to any corporation doing business in the state," holding that the internal-affairs doctrine—as a choice-of-law rule—must give way to NY's statutory scheme under §§1319/626:

> [T]he [NY] legislature has expressly decided to apply certain provisions of the state's business law to any corporation doing business in the state, regardless of its domicile. Thus, under … §1319, a foreign corporation operating within [NY] is subject … to the provisions of the state's own substantive law that control shareholder actions to vindicate the rights of the corporation. NYBCL §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 255, 261 (2d Cir. 1984) (citing *Barr v. Wackman*, 36 N.Y.2d 371 (1975)). Because the gatekeeper provisions of §§1319/626 control the assessment of plaintiffs' standing to bring a derivative lawsuit on behalf of a foreign corporation doing business in NY, ***Plaintiffs***' ***common-stock ownership***—"***holding***" ***under §626***(***a***)–(***b***)—***at the time of the*** "***transaction***," ***by itself***, ***conclusively establishes standing to sue***. Nothing more is required.

NY courts have upheld the imposition on foreign corporations of NY rules contained in BCL Article §§13 (and predecessors) as "conditions" to doing business here, to which they "consent." As Judge Cardozo explained in *German-American Coffee Co. v. Diehl*, "[s]uch a statute … is in effect a condition on which the right to do business within the state depends." 216 N.Y. 57, 64 (1915); *see also Pohlers v. Exeter Mfg. Co.*, 293 N.Y. 274, 280 (1944) (recognizing a foreign corporation's involuntary consent—"exacted by the state"—to be bound by NY law). As reflected in *In re Renren Inc. Derivative Litigation*, 2020 N.Y. Misc. LEXIS 2132 (Sup. Ct. N.Y. Cnty. May 20, 2020),

this Court is experienced in navigating this terrain.[6]

This derivative lawsuit, on behalf of a "foreign" corporation with a NY nexus, is well within NY's statutory scheme (§§1319/626) and NY precedents (established by *Mason-Mahon v. Flint*, 166 A.D.3d 754 (2d Dep't 2018) ("*HSBC*") and *Davis v. Scottish Re Group Ltd.*, 30 N.Y.3d 247 (2017)). *HSBC* was a derivative suit for an English bank filed by an UK-based stockholder alleging misconduct with a NY nexus. *HSBC* held that NY's ***demand-futility*** "***gatekeeping***" ***procedure controlled***, ***not the English pre-suit petition for permission to sue procedure***. *See* 116 A.D.3d at 757. *HSBC* so held, even though the UK Companies Act requires that the stockholder petition for permission to sue, prove wrongdoing without discovery and, if turned down, pay fees and expenses. ***That English pre-suit procedure is no different from the German pre-suit*** "***Court Procedures for Petition to Sue***"—**GSCA §148**. ***Foreign derivative suit gatekeeper rules—whether in foreign corporation codes or foreign civil procedure rules and whether designated as*** "***substantive***" ***or*** "***procedural***"—***do not apply in NY***. ***BCL §§1319/626 control the analysis of any standing, stock-ownership or post-suit demand-futility rules in derivative lawsuits brought in NY courts***.

There is no reason that this Court should shy away from hearing such lawsuits. Consistent with modernity and globalization, NY's legislature and appellate courts have

[6] In *Renren*, this Court assumed the applicability of the internal-affairs doctrine, and stated in a *dictum* that, under the doctrine, the law of the place of incorporation determined standing. *See* 2020 N.Y. Misc. LEXIS 2132, at *81. The Court made that statement—which was uncontested by the parties—without reference to §§626/1319. Unlike in *Renren*, Plaintiffs here contest the applicability of the internal-affairs doctrine and argue that NY's statutory scheme (§§1319/626) controls. Thus, *Renren dictum* does not control. *See Culligan*, 118 A.D.3d at 423 (distinguishing a similar statement in *In re CPF Acquisition Co.*, 255 A.D.2d 200 (1st Dep't 1998), because "there is no indication that the plaintiff in that case raised … §1319").

opened the courthouse to accommodate these lawsuits, *i.e.*, ***NY's strong*** "'***interest in maintaining and fostering its undisputed status as the preeminent commercial and financial nerve center of the preeminent commercial and financial nerve center of the Nation and the world***.'" *Renren*, 2020 N.Y. Misc. LEXIS 2132, at *56 (quoting *Ehrlich-Bober & Co. v Univ. of Houston*, 49 N.Y.2d 574, 581 (1980)).

Binding precedents—*HSBC*, *Scottish Re*, *German-American Coffee* and *Culligan*—lay out the approach:

a. BCL Article 13 and §§1319/626 override the common-law internal-affairs doctrine, and establish gatekeeper rules for instituting derivative lawsuits involving foreign corporations in NY's courts, ***including standing to sue***, ***demand-futility and stock-ownership requirements***.

b. Based on their "***plain language***," the foreign pre-suit provisions at issue in *HSBC* and *Scottish Re* were determined to be ***procedural***, rather than substantive, and thus inapplicable in NY in any event.

c. Specifically, in *HSBC* the "procedural provision" was contained in the UK Companies Act—the same as the GSCA—where those corporation codes contain ***both*** procedural and substantive provisions.

d. In the same vein, BCL §§626/627—NY's gatekeeper rules for corporate derivative lawsuits—are contained in the ***BCL***, not the CPLR. Where the statutory provision appears in a legal code does not determine whether the provision is substantive or procedural.

e. At bottom, this is a simple matter of NY statutory interpretation—***NY's legislative override of the internal-affairs doctrine***, *i.e.*, §§1319/626—rather than the intricacies of foreign law.

This approach, as explained in detail below, requires that the Court reject Bayer's arguments based on the internal-affairs doctrine and GSCA, and deny Bayer's motion.

II. FACTUAL BACKGROUND

A. Bayer Acquired Monsanto: "the Worst Acquisition in History"

The Bayer Defendants make no effort to defend the ***"Worst Acquisition in History***":

> … [***T*]*he $63 billion gambit ranks as one of the worst corporate deals—and is threatening the 156-year-old company's future* … *the value of the entire company* [*acquired*] *has almost entirely evaporated***.*
>
> ***
>
> ***You can only wonder whether Bayer's advisers underplayed, or simply didn't understand, the severity of the litigation risks when they went to Germany to promote the Monsanto deal***.
>
> ***
>
> "***Bayer bought the black sheep of the industry and clearly underestimated the litigation and reputational risks***."
>
> ***
>
> … ***Bayer's acquisition of Monsanto is a candidate for the pantheon of truly terrible mergers-and-acquisitions deals***.
>
> ***In retrospect, Bayer's purchase of Monsanto violated nearly every rule of M&A***. ***How could Bayer have missed the litigation risk***?

¶32.

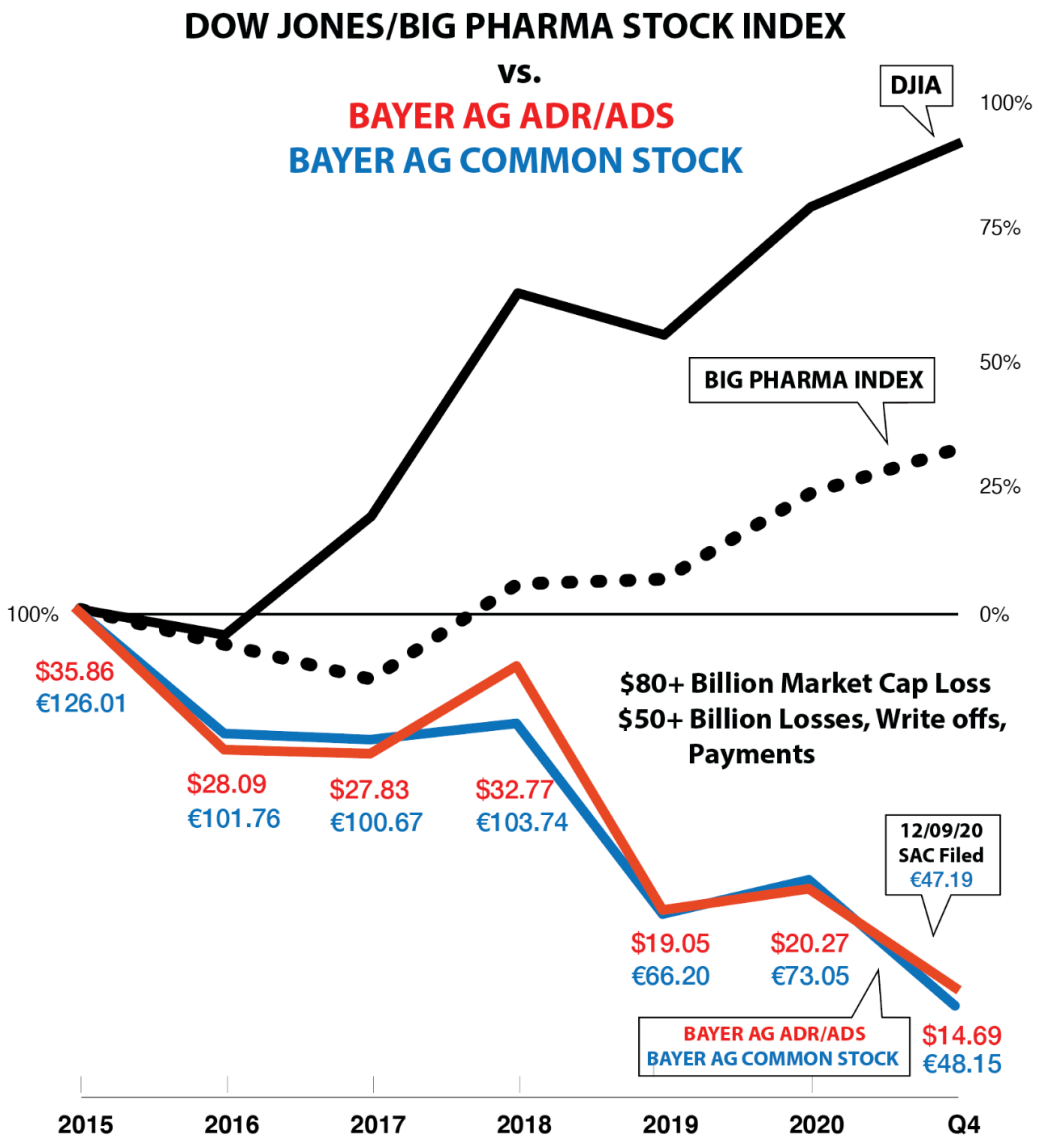
In 2015, Bayer had the highest valuation on the Frankfurt Exchange ($150-plus billion). In January 2016, Bayer's long time CEO ***Dekkers—who opposed a combination with Monsanto—suddenly announced he was quitting, two years early***. ¶3. Dekkers was succeeded by Baumann—the handpicked protégé of Supervisory Board Chair (and former CEO) Wenning. ¶¶295–297. Baumann arranged a meeting with Monsanto immediately upon taking office.

During 2015–2016, the agri-chemical industry was consolidating. ¶215. Monsanto was the "black sheep." ¶31. In 2015, ***Monsanto actually approached Bayer about purchasing Bayer's agri-business***. ¶216. Bayer, with little debt, was ***already*** an attractive takeover target. ¶217. Top brass feared if Bayer sold its agri-business and

became ***smaller with less debt***, it would be an even more attractive—and defenseless—target. If Bayer were taken over, they feared that they would lose their positions of power, prestige and profit. ¶¶25, 218. Few pieces were by then left on the board. Monsanto, however ungainly—the last kid chosen, was potentially in play. Time was of the essence. So, with the assistance of the Banks, Bayer undertook to acquire Monsanto to block any takeover. ***Dekkers quit because he opposed the Acquisition***. ¶6.

Pharmaceutical industry giant Pfizer was a serial acquirer with historical interest in Bayer. ¶¶23–26, 217. In spring 2016, ***Pfizer's pending $160 billion acquisition of Allergan terminated***, freeing Pfizer to pursue other prey. The Bayer Defendants rushed to block any Pfizer takeover by having Bayer acquire Monsanto. ¶220. As soon as Dekkers left, Baumann secretly traveled to St. Louis to make an ***unsolicited $60 billion all-cash offer for Monsanto***, which, in September 2016, accepted a ***$66 billion all-cash offer***. ¶51. Bayer ***financed the deal with debt***. ***This vast increase in Bayer's debt*** operated as a "***poison pill***," making Bayer, to quote Wenning, "***unacquirable***." ¶¶27, 100–101, 219.

When Bayer's opening offer leaked in May 2016, it sparked outrage and shock. Everybody "struggled to find investors who favor 'the deal.'" Observers said the deal will be "expensive, earnings dilutive and destroy value"—"a lose-lose bid." ¶8. Bayer was "paying too much"; had "thrown caution to the wind" and "may well regret" this. "It is probably a good bid to lose." *Id*. One prophet said Bayer's "acquisition of this 'Frankenstein' Monsanto could be a horror story." *Id*. That prediction proved prescient.



B. The Extreme Risks of the Monsanto Acquisition Were Exacerbated by Unique Factors, Heightening the Need for Independent, Unconflicted and Thorough Due Diligence

1. The Inherent Risks of Any Large Acquisition Were Exacerbated by the Circumstances of the Monsanto Deal

Management had to undertake, and the Supervisors had to assure, ***competent***, ***independent*** due diligence so they could act on a ***fully informed*** basis, consistent with their ***non-delegable duties*** of prudence and care. ¶¶154–155; GSCA §§93, 111, 116.

Big corporate acquisitions are risky. Over 60% fail, primarily due to inadequate due diligence. ¶¶154–160. These generic risks were exacerbated by unique factors here:

- ***Size and consideration—cash versus stock—requiring Bayer to take on $60-plus billion in debt. Deals do not get any riskier***.
- An "***unsolicited***" offer where the acquirer does not have the benefit of pre-offer due diligence. ***There was no pre-offer due diligence here***.
- ***Acquiring a competitor and, as a result, being subjected to regulatory antitrust reviews that delayed the closing for over 20 months and then required Bayer sell off its safe/successful "Liberty" herbicide—leaving Bayer completely dependent on cancer-causing Roundup***.
- ***A cross-border/cultural acquisition. These acquisitions often fail due to a failure to properly evaluate litigation risk—as happened here.***[7]

The Bayer Defendants (and the Banks) also knew large German corporations had a terrible record in cross-cultural border acquisitions, especially involving competitors where the ability to conduct due diligence was restricted. ¶162.

2. The Recent Failures of Bayer's Merck and Conceptus Acquisitions Were "Red Flags"

Bayer's $14-billion acquisition of Merck's consumer-products business (2014) and $1.6-billion acquisition of Conceptus (2013) (***both with Wenning and Baumann in charge***) ***failed due to inadequate due diligence***. ¶¶157–160. Conceptus was buried in ***39,000 product liability lawsuits and was written off***. ¶172. ***The Merck acquisition***

[7] Bayer was involved in the catastrophic asbestos litigation that claimed Halliburton, which purchased Dresser Industries without adequate due diligence into its asbestos litigations and went bankrupt. ¶174. Baumann admitted "***we have quite a bit of experience in U.S. products litigation***." His contempt for our legal system is undiminished (¶18):

> "We unfortunately have to pay an awful lot of money for a product that is perfectly well regulated and that, frankly, ***can make you quite angry because we are exposed to the US legal system***." … "***But it is what it is***."

also failed with billions in write-offs. Its failure was attributed to Bayer's "***limited ability to do due diligence***." ¶171. ***These recent failures were warnings***, calling for enhanced diligence with this Acquisition. ¶¶165–175.

Despite these two failed U.S. acquisitions, the Supervisors let this exceptionally risky acquisition go forward, without doing any investigation into the Banks Wenning and Baumann picked to advise Bayer and finance the deal. Even a cursory review would have revealed both Banks' disturbing track records of prior due-diligence failures in major acquisitions, and other dishonest, even criminal, conduct. *See* Banks Br. at 10–14. ***Worse, they allowed the Banks to operate under terms that created conflicts of interests and impaired their independence, i.e., 100% of the Banks' compensation was contingent on the deal closing***. *Id.* at 17–20.

C. Bayer and the Banks Failed to Conduct the Due Diligence into Monsanto Necessary to Protect Bayer

The $66-billion deal was inked in September 2016, subject to completion of due diligence and antitrust approvals. ¶51. Regulators obtained a ***court-ordered*** "Keep Separate" agreement that sharply restricted Bayer's access to competitor Monsanto ***until they gave permission to*** "***close***." ¶57. ***The Acquisition encountered unanticipated long delays. It did not close for 21 months, i.e., June 2018***. ¶¶179, 226.

1. The Inadequate Due Diligence into Monsanto's Roundup and Dicamba Litigations and Legacy Toxic-Tort Liabilities

As classifications of Glyphosate as a "***probable/known human carcinogen***" circulated, personal-injury lawyers geared up to go after Monsanto, "clamoring to sign up Roundup plaintiffs," making it the "top product targeted by mass tort lawyers" and their "marketing companies." ¶60. By September 2016, when the deal was signed, at least ***120 Roundup lawsuits had already been filed—with more coming***. ¶61. ***One firm***

"***currently ha*[*s*]* over two hundred additional plaintiffs***," while "***several other law firms have similar volumes of claimants***." *Id.*

As the closing was delayed, Roundup filings accelerated. *Id.* By June 2018, when regulators finally permitted the "close," ***11,000-plus Roundup-cancer lawsuits had been filed—a 10,000% increase while the deal was pending***. ¶62. The Monsanto due diligence was not a snapshot—rather a moving picture. As closing approached, the predicted "Frankenstein" horror story was unfolding. ¶8.

Red flags were flying. ***Roundup-litigation exposure was unlimited***. ¶56. ***Monsanto had been selling Roundup since 1976 without a cancer warning***. ¶55. The amount sprayed is almost incomprehensible: in the U.S., 100 million pounds each year—***worldwide 2 billion pounds***. *Id.* ***70,000 patients in the U.S. are diagnosed with non-Hodgkin Lymphoma each year***. *Id.* Because Monsanto had refused to quantify the financial risks of the Roundup lawsuits, Dicamba claims or its legacy PCB liabilities, ***Bayer was acquiring a "black hole" of liabilities***. ¶231.

Regulators ultimately demanded divestiture of ***Bayer's safe non-Glyphosate-based herbicide*** "***Liberty***." ¶14. If Bayer acquired Monsanto, it would be stuck with Roundup alone. ¶58. Faced with the choice between Roundup and Liberty, the Bayer Defendants—influenced by the Banks—made a terrible "bet-your-company" decision. ¶241. Engulfed in a stew of conflicts (their entrenchment and the Banks' $700-plus million in fees *contingent on closing*), the Bayer Defendants closed the Acquisition. ¶¶52, 198–199.

2. After Closing, Bayer Was Hit with Multi-Billion-Dollar Verdicts and Buried by 125,000 Roundup-Cancer Lawsuits, Massive Dicamba Claims and Billions of Dollars in Monsanto's Toxic-Tort Liabilities

Immediately after the June 2018 closing, Bayer suffered devastating Roundup verdicts. A July 2018 ***$289 million damages*** verdict was followed by ***more verdicts***, ***including $2 billion in punitive damages***. ¶¶11–12.

Bayer was soon drowning in 125,000 Roundup-cancer lawsuits. Management then undertook a dubious attempt to gin up a "global settlement" of all Roundup claims—even the unlimited "***in future***" claims by as yet unknown victims. The attempt to extinguish future Roundup claims involved promising $150 million in fees to plaintiffs' lawyers Bayer recruited to find and represent future injury "named plaintiffs" who were also to be paid hundreds of thousands of dollars for their help in extinguishing those claims***. This immediately blew apart***. ¶15. ***The judge rejected it as*** "***dubious***," ***fearing Bayer had*** "***manipulated***" ***the settlement process***. ¶16.

The "***Worst Acquisition in History"*** devolved into a catastrophic quagmire (¶17):

- Bayer paid $10 billion to settle ***some*** but not all of the 125,000-plus Roundup lawsuits—***leaving at least 30,000 Roundup cases unsettled***—with more being filed all the time.
- Bayer agreed to pay $820 million for legacy Monsanto PCB cancer claims.
- Bayer paid $400 million to create a Dicamba fund, but ***without settlements of any of the 140-plus existing lawsuits***.
- All these billions ***did not settle any of the actual Roundup/Dicamba verdicts aggregating hundreds of millions***.
- ***Despite paying billions***, ***Bayer obtained no protection against any future Roundup/Dicamba claims***—which are unlimited in number and exposure.

III. ARGUMENT

A. NY Law, Which Plaintiffs Satisfy, Governs the Issue of Standing

The Bayer Defendants claim that Plaintiffs seek to "evade" German law. That's false. Plaintiffs plead and seek the application of German ***substantive*** law, which ***imposes stringent duties*** on ***both Supervisors and Managers*** and persons (here the Banks) who assist their violations. GSCA §§91, 93, 111, 116, 117. However, Plaintiffs insist on their right to prosecute this case here under NY's procedural rules and to invoke NY's subject-matter jurisdiction under BCL §§1319/626, which govern the gatekeeper rules for derivative lawsuits on behalf of "foreign" corporations.

1. NY's Statutory Scheme (BCL §§1319/626) Dictates Choice of Law on Standing, Overriding the Internal-Affairs Doctrine

Framing the issue through the lens of the "internal-affairs rule," Bayer argues for dismissal because (it says) Plaintiffs lack standing under German law. ***But this framing—the starting point for Bayer's entire analysis—is wrong and, as a result, Bayer's argument is fundamentally flawed***.

"A court … will follow a statutory directive of its own state on choice-of-law." RESTATEMENT (SECOND) OF CONFLICTS OF LAW §6(1). A court defaults to various common-law choice-of-law rules only "[w]hen there is no such directive." *Id*. §6(2). There is "such [a] directive" here; ***statutory law, including BCL §1319, is the necessary and proper launch-point for analysis of the standing issue***.

BCL §1319(a) provides: "[T]he following provisions … ***shall apply to a foreign corporation doing business in this state, its directors, officers and shareholders***: (2) Section 626 (Shareholders' derivative action brought in the right of the corporation to procure a judgment in its favor)." Under §626(a), "[a]n action may be brought in the

right of a … foreign corporation to procure a judgment in its favor, by a holder of shares … or of a beneficial interest in such shares." Taken together, these provisions represent ***legislative decisions*** that (1) ***NY law specifies who can bring a derivative action on behalf of a foreign corporation regardless of—not subject to—the law of the place of incorporation***, and (2) a holder of either shares or a beneficial interest therein, who meets §626(b)'s continuous-ownership rule, can bring such a case.

A few trial-court opinions have incorrectly (and without analysis) ignored §1319 because (they say) it is not a conflict-of-laws rule, but is "a mere statutory predicate to jurisdiction." *See City of Aventura Police Officers' Ret. Fund v. Arison*, 70 Misc. 3d 234, 244 (Sup. Ct. N.Y. Cnty. 2020). This line originated with *Lewis v. Dicker*, which held as a "***matter of first impression***"—and ***without analysis***—that §1319 "does not compel the application of [NY] law." 118 Misc. 2d 28, 30 (Sup. Ct. Kings Cnty. 1982).

The rationale for ignoring/neutering §1319—that it isn't a choice-of-law rule—doesn't hold up in the face of statutory-construction rules. "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). To determine the legislative intent, "'all parts of a statute'" must "'be given effect'" and must be harmonized with each other, as well as with the general intent of the whole statute. *Anonymous v. Molik*, 32 N.Y.3d 30, 37 (2018) (citing cases). And effect and meaning must, if possible, be given to the entire statute and every part and word thereof. *Id.*; *see also* McKinney's Consol. Laws of NY, Book 1, Statutes §§97–98.

BCL §1319 is part of Article 13. BCL Article 13 is all about choice of law for foreign corporations; indeed, §1319 has no other purpose. The Legislature made policy

choices in the process of enacting Article 13, including which provisions would apply to ***all*** foreign corporations doing business in NY, and which provisions would apply only to corporations not exempted under BCL §1320. *See* Robert S. Stevens, *New York Business Corporation Law of 1961*, 47 CORNELL LAW REV. 141, 172 (1962). ***In enacting Article 13, the Legislature chose to override the internal-affairs doctrine in certain regards (including derivative standing)***.[8] "Most states follow the traditional internal[-]affairs doctrine, either through case law or statutory provisions. … Two states, [NY] 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, 164 (1985).

Well-reasoned case law recognizes that Article 13 was intended to override the internal-affairs doctrine. The Second Circuit, observing that the NY "legislature has expressly decided to apply certain provisions of the state's business law to any corporation doing business in the state, regardless of its domicile," rejected application of the "internal-affairs rule," because BCL §1319 requires that §626 apply in cases involving foreign corporations doing business in NY. *Norlin Corp.*, 744 F.2d at 261. Likewise, the First Department in *Culligan Soft Water* squarely held that "the issue of plaintiffs' standing to bring a derivative action is governed by [NY] law." 118 A.D.3d at 423. By making §§626/627 applicable to derivative lawsuits brought on behalf of foreign corporations doing business in NY, the legislature expressed a specific interest in

[8] Some provisions of Article 13 apply only to foreign corporations domiciled in NY; §1320 defines which provisions apply to all foreign corporations doing business in NY, and which apply only to domiciled foreign corporations. BCL §1319 applies to ***all***.

applying NY law to determine "the right[s] of stockholders to participate in the management of a corporation through the intervention of the [NY] courts." *Seybold v. Groenink*, 2007 U.S. Dist. LEXIS 16994, at *15 (S.D.N.Y. Mar. 12, 2007). "The public policy concerns of [NY] State as embodied in [§1319] mandate a departure from the 'internal[-]affairs' doctrine." *Stephens v. Nat'l Distillers & Chem. Corp*., 1996 U.S. Dist. LEXIS 6915, at *15 (S.D.N.Y. May 21, 1996).

2. In Any Event, the Internal-Affairs Doctrine Does Not Govern Standing in Cases Filed in NY Courts

There are other reasons to reject Bayer's overbroad view of the internal-affairs doctrine. As explained in *Edgar v. MITE Corp*., the doctrine is a conflict-of-laws principle, "recogniz[ing] that only one State should have the authority to regulate a corporation's internal affairs—matters peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders—***because otherwise a corporation could be faced with conflicting demands***." 457 U.S. 624, 645 (1982). The last phrase cabins the internal-affairs doctrine to issues where there must be one, and only one, rule—issues such as whether cumulative voting is available in shareholder votes, dividend rights, *etc*. It does not reach every aspect of corporate law or relations. ***The Court of Appeals held that standing***—"[***t***]***o whom the right to enforce*** [***a***] ***liability***" ***against corporate directors*** "***may be given***"—***is not in that narrow class of issues that must be governed in all places by a single rule***, ***i.e***., ***internal affairs***. *German-American Coffee*, 216 N.Y. at 66. In that case, directors of a New Jersey corporation doing business in NY declared and paid dividends out of capital, not surplus or profits—an act that violated both NY and New Jersey law. The corporation sued a director in NY. Defendant demurred on the ground that in New Jersey, the state of incorporation, only

stockholders—not the corporation—could sue to recover illegal dividends, arguing (as Bayer does here) that standing must be governed by a single rule. The Court of Appeals (Cardozo, J.) rejected defendant's argument. Observing that the ***underlying duty*** to refrain from paying illegal dividends was not at issue, but only the question of ***who could enforce that duty***, the Court upheld the corporation's standing under NY law:

> ***That New Jersey gives the right of action in like circumstances to the stockholders is not equivalent to a denial to the corporation of capacity to enforce a like right of action in the courts of another forum***. There is no risk that the directors will be made to pay the same damages twice. … [***T***]***he*** [***NY***] ***Legislature had the power to*** … give the right of action to the corporation itself.

Id. at 67. Here, the Legislature exercised its power to, and did under §626(a), give the right to bring derivative actions to all "holder[s] of shares or … beneficial interest[s] in such shares." It is irrelevant whether German law makes different choices as to who may enforce the liabilities in a German court.

3. NY Law Prohibits Blocking or Displacing This Court's Inviolable Subject-Matter Jurisdiction Created by BCL §§626/1319

Neither foreign legislation nor private agreement can oust NY courts' inviolable subject-matter jurisdiction. In *Ehrlich-Bober*, the Court of Appeals refused to enforce a Texas statute requiring certain lawsuits to be brought only in two specified counties in Texas. *See* 49 N.Y.2d at 574. "[T]he determination of whether effect is to be given foreign legislation is made by comparing it to our own public policy; and our policy prevails in case of conflict [due to] [NY's] recognized interest in maintaining and fostering its undisputed status as the pre-eminent commercial and financial nerve center of the Nation and the world." *Id*. at 581; *see also, e.g.*, *Deutsche Bank Sec., Inc. v. Montana Bd. of Invs.*, 7 N.Y.3d 65 (2006) (refusing to enforce a Montana statute requiring lawsuits against the state be brought exclusively in Montana); *Sachs v. Adeli*,

26 A.D.3d 52 (1st Dep't 2005) (holding that NY courts have jurisdiction even though Delaware law created exclusive jurisdiction over the dispute).

As mandated in §7(a), Article VI of the NY Constitution, the Supreme Courts "***shall have general original jurisdiction in law and equity***." N.Y. CONST. ART VI, §7(a). NY courts have an ***obligation*** to protect and exercise their subject-matter jurisdiction to provide a forum to NY residents seeking to remedy corporate misconduct with a NY nexus. "Plaintiffs, as [NY] residents, ***are presumptively entitled to utilize their judicial system for dispute resolution*** …. [NY] 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." *Broida v. Bancroft*, 103 A.D.2d 88, 91–92 (2d Dep't 1984); *Sudbury v. Ambi Verwaitung Kommanditgesselschaft*, 213 A.D. 98, 100 (1st Dep't 1925) (because "'plaintiff [is] a *bona fide* resident of [NY], the Supreme Court could not refuse to hear his case and had no right to dismiss it'") (quoting *Gregonis v. Philadelphia & Reading Coal & Iron Co*., 235 N.Y. 152, 161 (1923)).

In all, NY—as the ***center of both U.S. and world commerce*** with a sophisticated legal system open to its citizens and others—is unique among U.S. states because its legislature expressly included "foreign corporations" in its gatekeeper provisions for derivative lawsuits, *i.e*., BCL §§1319/626. Regulating ***foreign corporations doing business in NY is a key part of NY's*** exercise of its police power to protect its citizens—*i.e.*, consumers, competitors and shareholders who interact with "foreign" corporations. "As long as a foreign corporation keeps away from this state it is not for us to say what it may or may not do. ***But when it comes into this state and transacts business here, it must yield obedience to our laws***." *German-American Coffee*, 216 N.Y at 64.

B. German Law Does Not Dictate a Different Result

1. The "Admission Procedure" of GSCA §148 Is Procedural and Is Thus Inapplicable to Derivative Lawsuits Filed Outside Germany

Bayer seeks dismissal by extracting what it calls "substantive" standing requirements from GSCA §148. This argument founders not only because of the overriding rules of BCL §§1319/626, but also because Bayer's exposition of German law is flawed in a number of regards.

First, Bayer seeks to oust this Court's subject-matter jurisdiction, and deprive Plaintiffs of their ability to sue here via BCL §§1319/626, by extracting what Bayer calls a "substantive" standing requirement from GSCA§148. Bayer engages in deceptive advocacy by failing to reveal that 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***. This Court needs no "expert" assistance to understand the obvious.[9] GSCA §148's title is clear.

The Affirmation of Prof. Dr. Peter Mankowski (whose opinions are summarized in ¶7 thereof) details the correct analysis. ***The*** "***admissions procedure***" ***of GSCA §148 is procedural***. Mankowski ¶¶ 22–28. Derivative actions on behalf of German corporations

[9] This case ultimately need not devolve into a contest of experts in German law. A good translation of the GSCA is available, and its provisions are for the most part straightforward. In *Bodum USA, Inc. v. LaCafetiere*, 621 F.3d 624, 628–29, 631 (7th Cir. 2010), the Seventh Circuit gave short shrift to the need for experts on foreign law:

> It is no more necessary to resort to expert declarations about the law of France than about the law of Louisiana ….
>
> ***
>
> Trying to establish foreign law through experts' declarations not only is expensive (experts must be located and paid) but also adds an adversary's spin, which the court then must discount. … Because objective, English-language descriptions of French law are readily available, we prefer them to the parties' declarations.

are not restricted to German courts and may be brought elsewhere. Mankowski ¶¶9–21, 29–45. 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." Mankowski ¶¶29–38. 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 NY, or seek to dictate procedural rules to this Court. *Id.* ¶7(4)–(5).

Bayer in effect concedes that BCL §626 provides subject-matter jurisdiction and the applicable gatekeeper provisions ***by moving to dismiss based on §626(c)'s demand-futility prong***. *HSBC* and *Scottish Re* hold that §§626/1319 apply to derivative lawsuits "***brought in the right of a domestic or foreign corporation***." NY adopts the ***post-suit demand-futility rule*** as one of NY's "gatekeeper" devices to be applied ***after the verified complaint is filed, unlike the punitive foreign pre-suit petition procedures they rejected***.

"Under [NY] common[-]law principles, procedural rules are governed by the law of the forum"—here, NY. *Scottish Re*, 30 N.Y.3d at 257. BCL §§626/1319 creates subject-matter jurisdiction and its gatekeeper rules—whether termed "substantive" or "procedural"—govern the filing of derivative lawsuits involving foreign corporations in NY. "'[T]he law of the forum normally determines for itself whether a given question is one of substance or procedure,'" and "'a foreign jurisdiction's designation of the rules as procedural or substantive [is] instructive.'" *HSBC*, 166 A.D.3d at 756. Here, ***German law designates GSCA §148 as procedural***. Its title leaves no room for debate; it is a

"Court Procedure" no different than Grand Cayman Court Rule 12A found to be procedural and inapplicable in *Scottish Re*.

In Germany, a §148 pre-suit ***petition to sue*** can be filed in the "***regional court***" at the "company's registered seat, ***which court*** shall decide on the petition." GSCA §148 has no extraterritorial reach. A German procedural statute cannot command Bayer's NY-based shareholders travel to Germany to seek permission to sue and then return here to litigate their claims.

2. Even If the GSCA's Procedural Requirements Were Applicable, Plaintiffs Meet or Are Excused from Other Requirements Bayer Seeks to Impose

Bayer asserts that Plaintiffs do not appear in its "shareholder register" and are therefore disabled from exercising any shareholder rights. But shareholder rights in ***listed companies*** are not limited by the GSCA to persons with direct listing in the company's share register; persons who hold stock in listed companies through "intermediaries" (and as such may not be directly listed in the share register) are also "shareholders" entitled to exercise their rights as such. Mankowski ¶¶7(9), 53–62 & Exs. 2–3. Under Bayer's argument, most American retail investors would be excluded as a result of the "model" for stockholding in the U.S., where (unlike in Germany) shares are almost universally nominally held by DTC/Cede & Co. *Id*. ¶56 & Ex. 2 at 18–20. NY public policy will not tolerate the anti-American discrimination that would flow from Bayer's argument.

This case is not required to, but nonetheless does, meet the standard of GSCA §148(1), that "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," particularly in view of the allegations of self-interest (entrenchment) and failure to act of adequate

information. Mankowski ¶¶7(10), 63–70.[10] This is, in all events, a ***pleadings standard*** governed by NY law.

Bayer's assertion that a shareholder must own stock worth about $2.5 million—even if accepted as part of §148's admission procedure and therefore necessary for a derivative case in Germany (which we do not concede)—has no relevance here. First, as a matter of public policy and of constitutional law, NY courts do not—and must not—close their doors to all but the wealthiest. Whether the "ante" in Germany is $100,000 or $2.5 million, the concept of "means-testing" the right to file a lawsuit in NY is simply inimical to our system of justice. NY policy trumps conflicting foreign rules. *Ehrlich-Bober*, 49 N.Y.2d at 581.[11] Second, the minimum-stock requirement is a matter of procedure and thus not enforceable in NY. NY enacted in BCL §627 its own procedure aimed at disincentivizing meritless litigation. BCL §627 permits a bond to be imposed in derivative cases brought by shareholders owning less than $50,000 in stock, thus explicitly acknowledges that persons with smaller shareholdings are indeed eligible to bring derivative actions; that recognition puts the German procedural rule squarely at odds with NY law. Third, as Prof. Dr. Mankowski explains, all Bayer shares have identical rights under GSCA §11. Mankowski ¶7(8), 53–62.

[10] Among other things, as Prof. Dr. Mankowski explains, the term "improprieties" contained in the GSCA translation published by the international law firm Norton Rose Fulbright better expresses the meaning of the statute, in English, than does the "dishonest conduct" rubric favored by Bayer. Mankowski ¶66.

[11] *See also Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 668 (1966). ("Lines drawn on the basis of wealth … are traditionally disfavored.").

3. Bayer's Unenforceability Argument Is a Canard

As a last-resort Hail Mary, Bayer tries to warn this Court off by suggesting that a German court might not enforce this Court's judgment. Prof. Dr. Mankowski disagrees. Mankowski ¶¶46–52. First, the basic premise for the argument—that Bayer's articles of association require this case to be heard in Germany—is simply incorrect; they do not.[12] *Id.* ¶¶42–45. Moreover, the then-incumbent management of Bayer would be duty-bound to seek enforcement on behalf of Bayer. *Id*. ¶7(7). That current management resists the notion simply highlights their own self-interest and conflicts. The argument is also fallacious because of the combination of insurance, U.S.-based defendants and joint-and-several liability.

IV. CONCLUSION

NY's gatekeeper rules and German substantive law (*i.e*., the nature of the underlying duties and their breach) co-exist perfectly. Bayer's attempt to avoid liability on grounds of standing should be rejected.

Dated: New York, New York
April 13, 2021

Respectfully submitted,

s/ Clifford S. Robert
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[12] While Bayer's expert Koch pays lip service to the argument based on the Jurisdiction Clause, which provides that "all disputes between the Company and stockholders" be heard in Germany," he provides no analysis of why a "claim of the Company," brought ***on behalf of Bayer***, is also a claim ***against Bayer***. *See* Mankowski ¶¶7(6), 42–45. Contrary to Koch's argument, the Jurisdiction Clause is inapplicable. *Id*.

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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 6,867 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.]

§ 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.

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.

End of Document

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.

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NY CLS Bus Corp § 1320

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)

§ 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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