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

New York County Clerk's Index No. 656400/2020

New York Supreme Court

APPELLATE DIVISION — FIRST DEPARTMENT

Case No. 2022-04657

EZRASONS, INC., as a shareholder of BARCLAYS PLC derivatively on behalf of BARCLAYS PLC,

Plaintiff-Appellant,

against

SIR NIGEL RUDD, SIR DAVID WALKER, SIR JOHN SUNDERLAND, SIR MICHAEL RAKE, LORD GERRY EDGAR GRIMSTONE, REUBEN JEFFERY III, DAMBISA MOYO, STEPHEN THIEKE, ANTONY JENKINS, FRITS D. VAN PAASSCHEN, MARCUS AGIUS, ROBERT DIAMOND, JR., DAVID BOOTH, CHRISTOPHER LUCAS, FULVIO CONTI,

(Caption Continued on the Reverse)

BRIEF FOR PLAINTIFF-APPELLANT

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Defendants-Respondents,

and

BARCLAYS PLC,

Nominal Defendant-Respondent.

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PRELIMINARY STATEMENT

This appeal seeks reversal of the Supreme Court Commercial Division's order dismissing a shareholder derivative action brought on behalf of Barclays PLC ("Barclays" or the "Company"), an English corporation with a multi-billion-dollar operation emanating from its 47-story "head office" in New York City. Erroneously invoking the so-called "internal-affairs doctrine," the lower court chose to apply English law, which confers standing to bring derivative actions only to "members"—shareholders whose names are entered in the company's register of members. The lower court held that Plaintiff-Appellant Ezrasons, Inc. ("Plaintiff"), a New York-based holder of Barclays common stock, lacked standing to sue under English law because Plaintiff—like virtually all U.S.-based investors—owns Barclays shares in "street name." In so holding, the lower court failed to apply §1319 of New York's Business Corporation Law ("BCL"), which imposes New York's gatekeeping rules governing shareholder derivative actions, including BCL §626, on all derivative actions—whether they involve domestic or foreign corporations. And the lower court took away the protection for investors grafted into BCL §626 by the New York Legislature: conferring standing to bring derivative actions to all "holder[s] of shares … or of a beneficial interest in such shares." N.Y. BUS. CORP. LAW §626(a).

The lower court's disregard of §1319 is an error. Indeed, §1319, together with other provisions in the BCL and the New York Banking Law ("BL"), constitute a

statutory scheme (collectively, the "Foreign Corporation Statutes") to apply select provisions of New York substantive law to foreign corporations (including foreign banks)—as if they are incorporated in New York. On the books since 1963, this statutory scheme regulates certain discreet aspects of the "internal affairs" of foreign corporations that choose to conduct business in New York by mandating the application of certain BCL provisions to those "foreign corporation[s] …, [their] directors, officers and shareholders." N.Y. BUS. CORP. LAW §1319(a). And one such provision is BCL §626—New York's procedure for shareholder "derivative action[s] brought in the right of the corporation to procure a judgment in its favor." N.Y. BUS. CORP. LAW §1319(a)(2) (quoting §626's title).

This legislative intent—to regulate foreign corporations doing business in New York—is clearly manifested in §1319's text and its "bill jacket" materials.[1] The Foreign Corporation Statutes reflect the New York Legislature's judgment in balancing "the interests of shareholders, management, employees, and the overriding public interest." Robert S. Stevens, *New York Business Corporation Law of 1961*, CORNELL L. REV., Vol. 47, Issue 2, 141, at 172 (Winter 1962). This statutory scheme operates as a window to the legal world—providing a convenient and sophisticated legal system for the adjudication of disputes involving actors in modern-world

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

commerce, including foreign corporations, large and small. The courts are duty-bound to enforce these statutory provisions and to effectuate the intent of the Legislature. *See Irvine v. N.Y. Edison Co*., 207 N.Y. 425, 434 (1913). Here, the Legislature's imposition of New York's laws on foreign corporations doing business here is particularly important in light of New York's status—recognized by the courts—as the legal, commercial, and financial center of the world. *See Carlyle CIM Agent, L.L.C. v. Trey Res. I, LLC*, 148 A.D.3d 562, 564 (1st Dep't 2017).

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

- New York's Foreign Corporation Statutes trump the internal-affairs doctrine—a common-law rule selecting as governing law the law of the place of incorporation on "'matters peculiar to the relationships'" between the corporation and its officers, directors, and shareholders; and
- as mandated by §1319, §626 governs derivative actions brought on behalf

of foreign corporations in New York courts.

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

Independent of Article 13's consent regime, New York's appellate courts have invoked other doctrines, such as the settled rule applying forum law to procedural issues, to prevent wayward fiduciaries of foreign corporations from escaping New York's jurisdiction over derivative actions. *See Davis v. Scottish Re Grp. Ltd*., 30 N.Y.3d 247 (2017); *Mason-Mahon v. Flint*, 166 A.D.3d 754 (2d Dep't 2018) ("*HSBC*"). The Court of Appeals in *Davis* and the Second Department in *HSBC* have held that BCL §626's rules and procedures apply to derivative actions brought in New York on behalf of foreign corporations, displacing any procedural rules provided by the laws of such corporations' places of incorporation. Under *Davis* and *HSBC*, the provisions in England's Companies Act 2006 ("ECA") governing standing are procedural in nature and are thus applicable only to shareholder derivative actions brought in English courts. Those ECA provisions are inapplicable in New York courts. In fact, interpreting the ECA provisions as procedural works in harmony with the enforcement of §1319's mandate to apply §626 to this action.

Contrary to these binding authorities and the statutory directives requiring the application of §626 to this action, the lower court applied the standing requirement

of the ECA. This erroneous application of foreign law frustrates the New York Legislature's clear intent to insist that foreign corporations doing business in New York, as well as their directors and officers, be subject to New York's jurisdiction and its rules for shareholder derivative actions. As a result of the lower court's dismissal, Barclays' New York-based shareholders are left without remedy against its wayward fiduciaries for grave violations of their duties that have caused Barclays to pay $18 billion in fines and to lose tens of billions of dollars in shareholder value. This Court should reverse and remand.

QUESTIONS PRESENTED

Question 1: Do New York's Foreign Corporation Statutes (*i.e.*, BCL §§1319 and 626) govern the issue of shareholders' standing to bring derivative actions, as confirmed by *German-American Coffee*, *Davis*, *Culligan*, and *HSBC*, thus overriding any contrary provisions in ECA §§260–263, as well as the internal-affairs doctrine? The lower court answered "no," but the correct answer is "yes."

Question 2: Is an affidavit of a corporate employee saying that Plaintiff "does not appear" in the Company's share registry insufficient to constitute "conclusive" documentary evidence under CPLR 3211(a)(1) to "utterly refute," "beyond doubt," Plaintiff's verified allegations of share registration, and to justify dismissal at the pleadings stage—without discovery or production of the Company's share registry? The lower court answered "no," but the correct answer is "yes."

STATEMENT OF THE CASE

I. The Nature of This Action and the Importance of This Appeal

A. Overview of This Shareholder Derivative Action

Barclays is an English corporation doing business in New York. R893 (¶299).[2] Barclays maintains its U.S. "head office" in a Midtown Manhattan skyscraper and boasts naming rights to Brooklyn's main sports arena, the Barclays Center. R893 (¶297); R974, 1032. Through its Barclays Bank New York Branch, Barclays is licensed as a foreign banking corporation by the New York Department of Financial Services ("NYDFS"). R750 (¶31); R1016. More than 20 Barclays subsidiaries are also registered to do business here. R893 (¶297). Barclays' stock and other securities are listed on the NYSE. R750 (¶31). Thousands of Barclays' shareholders reside in New York. *Id*.

Plaintiff-Appellant Ezrasons, Inc., a New York-based Barclays shareholder, brought this shareholder derivative action on behalf of Barclays. R750 (¶30). Plaintiff alleges that it has continuously owned 2,500 shares of "registered" Barclays common stock during Defendants' entire course of misconduct. *Id.* Plaintiff further alleges that its "shares are registered with Barclays," and that it is a "member of the company" under the ECA. *Id*.

[2] Citations to "R___" are to pages of the Record. The allegations in Plaintiff's April 16, 2021 First Amended Verified Shareholder Derivative Complaint ("FAC") (R728–905), are cited as "¶¶___" in parentheticals following the Record citations.

The verified FAC details how certain current and former directors and officers of Barclays (collectively, "Defendants") permitted, or engaged in, a decade of wrongdoing emanating from Barclays' Manhattan headquarters. *E.g.*, R899–890 (¶¶294–313). The FAC alleges Defendants violated their duties as officers and directors of Barclays under §§174 and 178 of the ECA, which require them to "exercise reasonable skill and diligence" and make them liable to Barclays for "any act or omission involving negligence, default, breach of duty or breach of trust." R777 (¶91); *see also* R953–964. Defendants' misconduct led to severe punishment by the New York Attorney General ("NYAG") and the NYDFS, as well as federal regulators, costing Barclays $18 billion in fines and penalties. R899 (¶311). The resulting carnage left Barclays' stock selling for less than the price of a pack of cigarettes. *See* R743 (¶21); *see also* R931 (chart of stock index 2015–21).

The breathtaking multi-billion-dollar destruction of Barclays' shareholder value adversely impacted investors—large and small, institutional and individual—in New York and beyond. *See* R743 (¶21). For example, New York's public employee pension funds (and their millions of beneficiaries) hold millions of shares of Barclays stock. As of 2021–22, the New York State Common Retirement Fund and the New York State Teachers' Retirement System Fund held 16.6 million and 7.9 million shares of Barclays respectively. *See* OFFICE OF THE NEW YORK STATE COMPTROLLER, NEW YORK STATE COMMON RETIREMENT FUND ASSET LISTING AS

OF MARCH 31, 2021, at 9;[3] *see also* NEW YORK STATE TEACHERS' RETIREMENT SYSTEM, NEW YORK STATE TEACHERS' RETIREMENT SYSTEM GLOBAL EQUITY HOLDINGS AS OF MARCH 31, 2022, at 8.[4] Other New York pension funds, as well as thousands of New York-based investors, hold additional millions of Barclays shares.

The enormity of the damages to Barclays and the egregiousness of the underlying decade-long corporate miscreant require that Defendants—Barclays' wayward fiduciaries—be called to account. Controlled by Defendants, however, Barclays is powerless to bring suit against them. These circumstances present a classic case for a shareholder derivative action—a form of action that has been endorsed by New York courts since the 1800s. *See*, *e.g.*, *Attorney-General v. Utica Ins. Co.*, 2 Johns. Ch. 371, 389 (N.Y. Ch. 1817) (recognizing the jurisdiction over corporations and "persons who … exercise the corporate powers" to hold them "accountable to this court for a fraudulent breach of trust").

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

For two centuries, the power to hear derivative claims brought by shareholders on behalf of corporations has been firmly established in the courts in New York and beyond. In the 1832 case of *Robinson v. Smith*, for example, the New York Court

[3] *Available at* https://www.osc.state.ny.us/files/retirement/resources/pdf/asset-listing-2021.pdf (last visited Jan. 2, 2023).

[4] *Available at* https://www.nystrs.org/NYSTRS/media/PDF/About%20Us/equity_global.pdf (last visited Jan. 2, 2023).

of Chancery[5] exercised "jurisdiction" in aid of "the individual rights of the [in]corporators" to "call the directors to account, and compel them to make satisfaction for any loss arising from a fraudulent breach of trust or the willful neglect of a known duty." 3 Paige Ch. 222, 231–32 (N.Y. Ch. 1832). Likewise, in the 1855 case of *Dodge v. Woolsey*, the U.S. Supreme Court affirmed the federal courts' jurisdiction over shareholder derivative actions:

> It is now no longer doubted … that *courts of equity … have a jurisdiction over corporations*, *at the instance of one or more of their members*; to apply preventive remedies by injunction, to restrain those who administer them from doing acts which would amount to a violation of charters, or to prevent any misapplication of their capitals or profits, which might result in lessening the dividends of stockholders, or the value of their shares, as either may be protected by the franchises of a corporation, if the acts intended to be done create what is in the law denominated a breach of trust.

59 U.S. 331, 341 (1856).[6]

The courts' assertion of jurisdiction over shareholder derivative actions was timely because, before the turn of the last century, American capitalism produced a proliferation of corporations chartered by states. As corporations spread, so did abuse by officers and directors. This in turn gave rise to the shareholder derivative

[5] Constituted by the Judicature Act of 1691 of the colonial government of New York, "[t]he Court of Chancery ceased to exist in 1847 when the third State Constitution went into effect. The 1846 constitution reorganized the judiciary, vested equity and common law jurisdiction in the Supreme Court and established the New York Court of Appeals as the court of final appeal." *NYS Court of Chancery*, HISTORICAL SOCIETY OF THE NEW YORK COURTS, *available at* https://history.nycourts.gov/figure/court-chancery-chancellors/ (last visited Jan. 2, 2023).

[6] Unless otherwise noted, all emphases in quoted texts are added.

lawsuits to call corporate fiduciaries to account. In 1949, one shareholder derivative action, *Cohen v. Beneficial Industrial Loan Corp.*, reached the U.S. Supreme Court. *See* 337 U.S. 541 (1949). In *Cohen*, one of 16,000 shareholders of a corporation—holding 100 of its more than two million shares—sued the corporation's officers and directors, alleging 18 years of breaches of duties that resulted in the loss of over $100 million (over $1 billion in today's dollar) in corporate assets. *Id*. at 544. Justice Robert H. Jackson emphasized the importance of permitting "*holders of small interests*" to bring derivative actions in the courts—as the only "*practical check on* [*fiduciary*] *abuses*" (*id*. at 547–48):

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

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

As jurisdiction over shareholder derivative lawsuits took hold in the courts, the power to regulate foreign corporations became cemented in the legislatures of both the states where they are incorporated and the states where they conduct business.[7] As courts recognized at the turn of the 19th century, it became increasingly common for corporations chartered by one state to conduct business in other states. *See generally Merrick v. Van Santvoord*, 34 N.Y. 208 (1866). The need also rose for the non-incorporation states "to regulate and restrain foreign corporations in doing business [within their borders] under charters from other [state] governments." *See id.* at 212. Judicial response to this need was resolute. The U.S. Supreme Court affirmed the non-incorporation states' "plenary power to exclude a foreign corporation from doing business within [their] borders" and to regulate a foreign corporation "in their discretion"—"as in their judgment will best promote the public interest." *See Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 343 (1909); *see also Paul v. Virginia*, 75 U.S. 168, 181 (1869).

Consistent with this "plenary" and "discretionary" power, the New York Legislature enacted the Foreign Corporation Statutes in 1963 imposing certain BCL

[7] *See generally*, *e.g.*, George W. Wickersham, *State Control of Foreign Corporations*, YALE L.J., Vol. XIX, No. 1, 1 (Nov. 1909); J. Thomas Oldham, *Regulating the Regulators: Limitations upon a State's Ability to Regulate Corporations with Multi-State Contacts*, DENVER L. REV., Vol. 57, Issue 3, 345 (Jan. 1980).

provisions upon "foreign corporation[s] doing business in this state, [their] directors, officers and shareholders." N.Y. BUS. CORP. LAW §1319(a). Among these enumerated provisions is §626, which codifies New York courts' long-standing jurisdiction over shareholder derivative actions and confers standing to sue to all "holder[s] of shares … of the corporation or of a beneficial interest in such shares[.]" N.Y. BUS. CORP. LAW §626(a).

Imposing New York's gatekeeping provision for derivative actions on foreign corporations doing business in New York is exactly the kind of legislative judgment contemplated by the U.S. Supreme Court in *Paul*. As the Court of Appeals and this Court have repeatedly recognized, New York enjoys its "unique status as a global center of finance and commercial transactions." *E.g.*, *Deutsche Bank Nat'l Trust Co. v. Flagstar Capital Mkts.*, 32 N.Y.3d 139, 162 (2018); *Carlyle CIM Agent,* 148 A.D.3d at 564 (same).

This judicial recognition bares out in the numbers. New York City is home to more than 5,000 foreign companies, which employ nearly 300,000 New Yorkers and contribute 11% of the City's $761 billion annual economic output. *See* Partnership for New York City, *Global Business, Local Benefit, Foreign Contributions to the New York Economy*, at 2 (Nov. 2017).[8] In addition to the 1,700-

[8] *Available at* https://pfnyc.org/wp-content/uploads/2020/01/Global-Business-Local-Benefit-Nov-2017.pdf (last visited Jan. 2, 2023).

plus American corporations whose securities trade on the New York Stock Exchange ("NYSE"), the securities of over 400 corporations from Europe, Asia, and the Americas are listed here.[9] With millions of New Yorkers as employees, customers, and investors of these foreign companies, implementation of New York's Foreign Corporation Statutes is of vital importance.

This appeal seeks reversal of the lower court's refusal to apply New York's Foreign Corporation Statutes—specifically, BCL §626's gatekeeping provision for shareholder derivative actions—to Barclays, whose footprint marks a Manhattan skyscraper and a Brooklyn sports arena. The fundamental question is whether the Legislature meant what it said when it enacted two BCL provisions:

- BCL §626, creating subject-matter jurisdiction for shareholder derivative actions and extending standing to beneficial owners of shares; and
- BCL §1319, effectively requiring foreign corporations "doing business" in New York to consent to the litigation of derivative suits filed in New York under the rules established by §§626 and 627.

The lower court, as well as this Court, have a duty to follow the Legislature's statutory directives. *See*, *e.g.*, *Irvine*, 207 N.Y. at 434 ("[i]t is the duty of the court to enforce the provisions of the statute"). This question of statutory interpretation

[9] *See NYSE International Stats*, *NYSE Listings*, NEW YORK STOCK EXCHANGE, *available at* https://www.nyse.com/listings/international-listings (last visited Jan. 2, 2023).

here is presented in a policy-laden context, *i.e.*, the reach and impact of the Legislature's scheme to regulate foreign corporations and the judiciary's ability to implement that statutory scheme. New York's appellate courts, including this Court in *Culligan*, have uniformly upheld the statutory grant of subject-matter jurisdiction over shareholder derivative actions, and have faithfully applied New York's gatekeeping rules governing those actions. But the lower courts have proven hostile to exercising the jurisdiction conferred by the Legislature, and have instead dismissed shareholder derivative actions involving foreign corporations. That was what the lower court did in this action brought by the New York-based Plaintiff on behalf of Barclays. This appeal presents an opportunity for this Court to bring the lower courts back in line.

II. The Relevant Facts as Alleged in the Verified Complaint

A. The Plaintiff-Appellant's Ownership of Barclays Shares

Ezrasons, Inc. is a New York corporation based in Manhattan. R750 (¶30). Plaintiff alleges in its verified FAC that it originally owned 2,500 Barclays American Depositary Receipts ("ADRs") and currently owns Barclays common shares as a result of a conversion. *Id*. Plaintiff has continuously held Barclays shares during Defendants' course of misconduct. *Id*. Plaintiff's shares are registered with Barclays; and hence, Plaintiff is a "member of the company" under the ECA. *Id.*

B. Barclays' Wrongdoing Under Defendants' Watch

During the 2008–09 financial crisis, with large financial institutions on the brink of failure, banking regulators offered billions in assistance. R736 (¶7). Acceptance, however, came with increased supervision and requirements to improve internal financial and regulatory compliance controls. *Id.* Although Barclays was desperate for funds, its directors and officers rejected billions in aid. *Id*. Because of their prior misconduct, Barclays directors and officers were "scared to death" of more government oversight, "paranoid" about losing their jobs, and in a "panic over … a government takeover," fearing the recapture of $2 billion in bonuses they had recently pocketed, and being ousted from their positions. R736–739 (¶¶7–14).

Defendants fended off the regulators by going to Arab Sheikhs to obtain billions of rescue capital (the "Qatar Deals"), agreeing to "dodgy" secret side deals with the Sheikhs—"sham" "advisory" agreements to pay the Sheikhs $500 million (kickbacks) personally in return for their "investment." R738 (¶11). Defendants also facilitated the Qatar Deals via secret circular loans where Barclays provided some of the money to the Sheikhs that they "invested" in Barclays. *Id*. Regulators "smelled a rat." R739 (¶13). The details of the "f**king side deal," the "corrupt payment" to the Sheikhs and the "roundabout" loan were uncovered. R739 (¶14). Regulators concluded that Barclays directors and officers had "acted recklessly" and imposed an interim fine of $80 million. *Id*. Civil and criminal proceedings dragged

on for years. R736–739 (¶¶7–14); R798–815 (¶¶124–154).

By 2008, Barclays' New York operations had already been repeatedly penalized for serious violations and subjected to a non-prosecution agreement with the Manhattan District Attorney's Office. R741 (¶¶17–18); R817–819 (¶¶161–163). In 2008, Defendants caused Barclays to acquire the remnants of scandal-ridden bankrupt Lehman Brothers, which regulators would never have permitted, had Barclays accepted government rescue money. R741 (¶18).

After acquiring Lehman, Defendants undertook a major expansion of Barclays' New York operations without adequate controls or supervision. R834–835 (¶194). As a result, Defendants allowed a "deeply flawed" and "out of control" business culture to persist (R734–736 (¶¶5–6)):

- Barclays pleaded guilty "to conspiracy to fix prices and rig bids … collusive conduct … a federal crime that violated [a prior] non-prosecution agreement," "misconduct [that] was serious, widespread and extending over a number of years" made possible because "Barclays failed to ensure it had proper controls in place."
- Barclays failed to "devise and maintain a system of internal accounting controls," and had "deficiencies in its compliance systems," because of [Barclays'] "deeply flawed culture," "shortcomings in governance controls and corporate culture" and the Board's failure "to take reasonable care to

organize and control its affairs responsibly and effectively, with adequate risk management systems."

- The misconduct "persisted despite similar control failures …[,] which were the subject of previous enforcement actions," and "Barclays failed to apply the lessons from previous enforcement actions."

Catastrophe followed, and Barclays was consumed by unending scandals. R815–850 (¶¶155–221). Barclays suffered a criminal conviction, more non-prosecution agreements, censures and the ouster of two Board Chairs and CEOs at the insistence of regulators. R741–742 (¶¶18–20); R744–746 (¶¶22–26). In addition, Defendants' years of misconduct emanating from Barclays' New York operations resulted in massive penalties imposed by the NYAG and NYDFS, as well as federal authorities:

- August 2010: $300 million, NYAG and U.S. Department of Justice ("DOJ"). Money laundering. R817–819 (¶¶162–163).
- June 2012: $452.5 million, DOJ. LIBOR manipulation. R823 (¶174).
- Mid-2013: $453 million, Federal Energy Regulatory Commission. Manipulation of U.S. power market. R833 (¶192).
- September 2014: $15 million, SEC. "Systemic [c]ompliance [f]ailures." R834–835 (¶194).
- May 2015: $2.4 billion, NYDFS. Conspiring to manipulate Forex trading.

R836–837 (¶197).

- May 2015: $710 million, DOJ. Guilty plea for Forex manipulation in New York. R837–838 (¶198).
- May 2015: $242 million, U.S./New York Federal Reserve. Unsafe and unsound practices, deficient policies and procedures. R838–839 (¶200).
- November 2015: $150 million, NYDFS. Forex misconduct in New York. R840 (¶202).
- July 2016: $105 million, SEC and NYAG. Dark-pool violations. R840–841 (¶203).
- August 2016: $100 million, NYAG. Interest-rate manipulations. R841 (¶204).
- May 2018: $97 million, SEC. Overcharging clients. R843 (¶207).
- March 2018: $2 billion, DOJ. Fraud in sales of toxic securities. R844 (¶209).
- September 2019: $6 million, SEC. Violations of the Foreign Corrupt Practices Act. R848 (¶218).
- December 2018: $15 million, NYDFS. Unsafe banking practices. R876 (¶261).

This litany of wrongdoing at Barclays is the result of Defendants' "negligence and breach of duty" in New York. R742 (¶20); R794–797 (¶¶119-123). Barclays'

directors and officers admitted (R735–736 (¶6); R789–794 (¶¶108–118)):

> "The last 10 years have been troubled for Barclays … much of this has been self-inflicted. … [S]erious mistakes were made and trust badly damaged[.]"
>
> Barclays "has sustained financial and reputational damage … penalties and remedies [that] will haunt us for some years."
>
> "Barclays faced much criticism of the behaviours it has demonstrated—the Board is "unanimous as a board that we must accept this criticism."

C. Barclays' New York Presence and Operations

Barclays' U.S. operations are headquartered in New York City, where it maintains its 47-story "head office" at 745 Seventh Avenue. R892 (¶297). Barclays recognizes the U.S. market its "second home market" (*id*.):

> The US is [Barclays'] second home market …. The US accounts for a significant portion of [its] employees, revenue and profit. …
>
> **Key facts about Barclays in the US**
>
> 10,045 employees in the US
>
> €7,750 million of income (30.3% of Barclays' total)
>
> €2,186 million of profit (39.6% of Barclays' total)[.]

More than 20 Barclays' subsidiaries are registered to do business in New York, and Barclays Bank New York Branch is licensed by the NYDFS. R893 (¶299). Barclays' securities are listed on the NYSE. R750 (¶30). Over 350 million of its shares are owned by U.S. residents—many of whom reside in New York. *Id*.

As demonstrated in its organizational chart (*see* R752 (¶35)), Barclays is a

hierarchical corporate enterprise with top-down control by the publicly owned parent's Board of Directors of its operating subsidiaries, including branches in New York. R785–787 (¶¶100–103).

The misconduct of Barclays' directors and officers was directed at New York and its residents, customers and investors, including New York's public and private pension funds. R896 (¶305). Key aspects of Defendants' alleged violations of their duties of due care occurred in New York City. *See* R890–899 (¶¶294–312). A substantial part of the $18 billion in penalties was imposed by the NYAG or NYDFS. Many of the key witnesses and much of the relevant evidence are located in New York. R898–899 (¶311). In all, this shareholder derivative action—brought by a New York resident—belongs in New York courts.

III. The Lower Court's Order

At an April 26, 2022 hearing, the lower court granted Respondents' motion to dismiss the verified FAC.[10] R48. Feeling "obliged to apply … the internal affairs doctrine," the lower court thought that the doctrine required the application of the laws of England, Barclays' country of incorporation. R45. Applying English law, the lower court concluded that Plaintiff lacked standing to bring a shareholder derivative action. *Id*.

[10] Respondents include six New York-based individuals and Barclays' New York-based investment banking subsidiary, Barclays Capital Inc. *See* R50.

The lower court refused to "accept the idea that the *Culligan* case dictates a different outcome." R46. To explain away its departure from *Culligan*'s holding, the lower court insisted that "we are … asked to scrutinize the internal affairs of this English Company [and] we need to apply English law." *Id*. Casting *Culligan* aside, the lower court held that the Foreign Corporation Statutes "[did] not override the internal affairs doctrine on the issue of standing" and "did not require application of New York law." *Id.* Nor did the lower court ever discuss *Davis* or *HSBC*.

The lower court rejected as "conclusory" Plaintiff's verified allegation that "Plaintiff's shares are registered with Barclays and it is hence a 'member of the company' under the ECA" (R750 (¶30)). R45. Instead, the lower court relied on an affidavit of a Barclays employee stating that "plaintiff is [not] a registered member" based on a search in Barclays' share registry. *Id*. Even though the lower court acknowledged that standing is "a matter of pleading" (R27), it accepted the hearsay affidavit and ignored Plaintiff's request for discovery and production of the share registry. R26–27. Without giving Plaintiff an opportunity to cross-examine the affiant or to conduct discovery regarding Barclays' share registry, the lower court concluded that "it is apparent that the Plaintiff is not a registered member." R45.

Based on the foregoing, the lower court dismissed Plaintiff's verified FAC, stating that "we'll see what the First Department has to say." R48.

STANDARD OF REVIEW

This Court reviews the grant of a motion to dismiss *de novo*. *See*, *e.g.*, *511 W. 232nd Owners Corp. v. Jennifer Realty Co*., 98 N.Y.2d 144, 151–52 (2002) ("our task is to determine whether plaintiffs' pleadings state a cause of action"); *Leon v. Martinez*, 84 N.Y.2d 83, 87–88 (1994) (same). The lower court's determinations regarding foreign law are reviewed *de novo*. CPLR 4511(c); *see also DeJesus v. DeJesus*, 90 N.Y.2d 643, 647 (1997). Likewise, questions of statutory construction are reviewed *de novo*. *N.Y.C. Transit Auth. v. N.Y. State Pub. Emp't Relations Bd*., 8 N.Y.3d 226, 231 (2007). When analyzing whether plaintiffs have sufficiently alleged derivative standing on a CPLR 3211 motion, their well-pleaded allegations "are presumed to be true and accorded every favorable inference." *Godfrey v. Spano*, 13 N.Y.3d 358, 373 (2009).

ARGUMENT

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

In dismissing the verified FAC and depriving Plaintiff of its day in court, the lower court committed legal errors on two fronts. First, the lower court failed to comply with the directive of New York's Foreign Corporation Statutes and disregarded §1319's mandate to apply New York's gatekeeping rules for shareholder derivative actions to determine Plaintiff's standing to bring derivative claims. Instead, the lower court applied the internal-affairs doctrine in contravention of

Culligan's holding, effectively relinquishing its jurisdiction—vested by §626—over this shareholder derivative action. The lower court abdicated its duty to enforce §626 and §1319 as they are written. *See Irvine*, 207 N.Y. at 434. This error requires reversal.

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

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

Clear and explicit in their texts, New York's Foreign Corporation Statutes codify the courts' centuries-old jurisdiction over shareholder derivative actions and confer standing to all shareholders—including holders of a "beneficial interest" in shares—of foreign corporations to bring derivative actions, so long as those foreign corporations do business in New York. *See* N.Y. BUS. CORP. LAW §626(a), §1319(a)(2). The intent of the New York Legislature to regulate foreign corporations with respect to the procedure to bring shareholder derivative actions is

reflected not only in the statutory text, but also in legislative history. *See* Bill Jacket, L 1961, ch. 855, *Joint Report of Committees on Corporate Law of the New York State and New York City Bar Association*, at 32–35 (Jan. 25, 1961).

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

As discussed below, by invoking the internal-affairs doctrine and applying English law to derivative standing, the lower court erred in departing from *Culligan* and disregarding §1319. This error amounts to a refusal to exercise jurisdiction over this shareholder derivative action despite §626's grant of such jurisdiction, which New York courts have consistently asserted since the early 1800s.

Accordingly, with respect to Question 1 (whether New York law or English law shall apply on the issue of a shareholder's standing to bring derivative claims), this Court should find that New York's Foreign Corporation Statutes require the application of New York law, and should reverse the lower court's decision to apply English law.

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

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

a. The Text of §1319 Explicitly Mandates the Application of §626 to Shareholder Derivative Actions Brought on Behalf of Foreign Corporations Doing Business in New York

The text of §626(a) establishes subject-matter jurisdiction in New York courts over shareholder derivative actions and confers standing to bring derivative claims on behalf of "a domestic or foreign corporation" to all "holder[s] of shares … of the corporation or of a beneficial interest in such shares":

> **§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. …

N.Y. BUS. CORP. LAW §626(a). The text of §1319 mandates that New York's gatekeeping rules regarding shareholder derivative actions—§626 and §627—be applied to "foreign corporation[s] doing business in this state, [their] directors, officers and shareholders":

> **§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*:
>
> …
>
> (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). …

N.Y. BUS. CORP. LAW §1319(a)(2)–(3).

The texts of §1319 and §626 provide a clear directive of the New York Legislature: *foreign corporations doing business in New York are subject to §626*, which authorizes "holder[s] of shares … of … corporation[s] or of a beneficial

interest in such shares"—*i.e.*, holders of common stock "in street name"[11]—to bring shareholder derivative actions in New York courts. *See* N.Y. BUS. CORP. LAW §§626(a), 1319(a)(2). Where, as here, legislative intent is clear from statutory text, the court's task of statutory interpretation ends, and the court must apply the statute according to its plain text. *See Deutsche Bank Nat'l Trust Co. v. Lubonty*, 208 A.D.3d 142, 147 (2d Dep't 2022) ("[t]he starting point in interpreting a statute is its language, for if the intent of [the legislature] is clear, that is the end of the matter") (quoting *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 409 (1993)). A review of legislative history, however, further crystalizes this legislative intent, expressed through §1319's text, to apply §626 to foreign corporations doing business in New York.

b. The Legislative History Reflects the New York Legislature's Considered Judgment to Regulate Foreign Corporations with Respect to Gatekeeping Rules Governing Shareholder Derivative Actions

Article 13 of the BCL, which includes §§1317 and 1319, was the product of years of study and work by the New York Legislature in the early 1960s to revise and modernize the BCL. *See* Robert A. Kessler, *The New York Business*

[11] According to a 2011 European Union study (R1053–1093), U.S.-based investors almost universally hold their stock through a "security entitlement model," in which the legal owner is Cede & Co., a subsidiary of the NYSE, while English investors utilize the "trust model." *See* DIRECTORATE-GENERAL FOR THE INTERNAL POLICIES OF THE EUROPEAN PARLIAMENT, *Cross-Border Issues of Securities Law: European Efforts to Support Securities Markets with a Coherent Legal Framework*, at 20 (2011); R1074.

Corporation Law, ST. JOHN'S L. REV., Vol. 36, No. 1, Art. 1 at 1–2 (Dec. 1961).[12] The research and drafting process—spanning over four years—was known to be "elaborate" and "well organized." *Id*. at 4. "The initial research reports alone total[ed] over 1750 pages." *Id*. Research reports "were widely distributed for comments" to various constituents, including "the State and New York City Bar Associations," which voiced opposition on behalf of business interests to the regulation of foreign corporations. *See id*. at 3–4. Before the draft statute was finalized, "public hearings [were] held in various places in the state." *Id*. at 4.

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

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

Legislature's efforts in striking the "delicate" balance between encouraging "legitimate derivative actions" and discouraging "strike" suits. *Id*. at 36.

To that end, the New York Legislature considered the objection of the corporate establishment, represented by the State and New York City Bar Associations. The corporate establishment criticized the new Article 13—specifically §1317[13] and §1319—as an uncommon attempt "to regulate the internal affairs of foreign corporations" and to "impose additional obligations and liabilities upon foreign corporations, their directors and stockholders, which go well beyond what other states see fit to do":

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[13] Just like §1319, BCL §1317 subjects foreign corporations doing business in New York to New York law imposing liabilities on officers and directors. N.Y. BUS. CORP. LAW §1317. That provision expressly confers subject-matter jurisdiction to the New York courts to enforce such liabilities upon directors and officers of foreign corporations "*in the same manner as in the case of a domestic corporation*":

> **§1317. Liabilities of directors and officers of foreign corporations**
>
> (a) Except as otherwise provided in this chapter, the directors and officers of a foreign corporation doing business in this state are subject, to the same extent as directors and officers of a domestic corporation, to the provisions of:
>
> (1) Section 719 (Liability of directors in certain cases) except subparagraph (a)(3) thereof, and
>
> (2) Section 720 (Action against directors and officers for misconduct).
>
> (b) *Any liability imposed by paragraph (a) may be enforced in*, *and such relief granted by*, *the courts in this state*, *in the same manner as in the case of a domestic corporation*.

Id. And §720 expressly authorizes shareholder derivative actions "against directors and officers for misconduct," including "neglect of, or failure to perform, or other violation of his duties in the management and disposition of corporate assets committed to his charge." N.Y. BUS. CORP. LAW §720(a)–(b).

Article 13
FOREIGN CORPORATIONS

General.

> This Article we believe is particularly deficient in that it … *would impose additional obligations and liabilities upon foreign corporations, their directors and stockholders*, which go well beyond what other states see fit to do.
>
> * * *
>
> §13.17 *Liabilities of directors and officers*.
>
> … [T]his is an extremely onerous and unnecessary section. The liabilities of directors and officers is a matter for the state of incorporation and *it is neither appropriate nor good sense for New York to attempt to regulate the internal affairs of foreign corporations*.
>
> * * *
>
> §13.19 *Applicability of other provisions*.
>
> This section contains a detailed list of Articles and sections of the Bill [including § 626] which are made applicable to foreign corporations, the directors, officers and shareholders thereof. There is no such provision in the Model Act. *This section is an attempt to regulate the internal affairs of foreign corporations and we strongly recommend that it should be deleted in its entirety*.

Bill Jacket, L 1961, ch. 855, *Joint Report of Committees on Corporate Law of the New York State and New York City Bar Association*, at 32–35 (Jan. 25, 1961). Objecting to the enactment of the Foreign Corporation Statutes, the corporate establishment urged adherence to "the approach of the Model Act … *to eschew any attempt to regulate the internal affairs of foreign corporations*." *Id*. at 33.

As Dean Robert S. Stevens observed,[14] "[i]t was strongly urged before the [Joint] Committee that the policy of other states should be respected and that foreign corporations should be subject to and regulated by the law of the jurisdiction of incorporation, not by the law of New York." Stevens, *New York Business Corporation Law of 1961*, at 172. Casting aside these objections by the corporate establishment and others, however, the New York Legislature passed the new BCL based on its judgment that it "represent the proper balance of the interests of shareholders, management, employees, and the overriding public interest." *Id*. The modernized BCL, including the Foreign Corporation Statutes, became law, codifying the New York courts' long-standing jurisdiction over shareholder derivative actions and subjecting foreign corporations doing business in New York to New York's "conditions precedent for bringing a shareholder's derivative action." Kessler, *The New York Business Corporation Law*, at 85.

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

For over a century, the Court of Appeals has faithfully implemented the Legislature's scheme to regulate foreign corporations. Writing for a unanimous Court of Appeals in the 1915 case of *German-American Coffee*, Judge Benjamin N.

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

Cardozo applied New York law to the directors of a foreign corporation as a "condition" of its conducting business in New York. *See* 216 N.Y. at 64. Judge Cardozo reasoned that the directors and the foreign corporation had consented to the application of New York law by transacting the corporation's business here:

> As long as a foreign corporation keeps away from this state, it is not for us to say what it may do or not do. But when it comes into this state, and transacts its business here, it must yield obedience to our laws …. This statute makes no attempt to regulate foreign corporations while they keep within their domicile. It is aimed against them only while they elect to live within our borders. The duty which it imposes arises only when they come to us, and ends the moment that they leave us. *Such a statute*, *however phrased*, *is in effect a condition on which the right to do business within the state depends*. …
>
> We hold, therefore, that *directors of a foreign corporation transacting business in this state and subjecting itself to the conditions established by our laws*, *may be charged with liability if they* [*do what our laws regulate*].

Id. at 63–65.

Notably, the consent by foreign corporations to the application of New York laws, as prescribed by the New York Legislature, is "exacted"—involuntarily—so long as they choose to conduct business in New York. *See Pohlers*, 293 N.Y. at 280 (the fact that such "consent has been exacted by the State—not voluntarily offered by the defendant … does not detract from its validity"). And this consent scheme falls within the ambit of the broad power of the Legislature, affirmed by the U.S. Supreme Court in *Paul* and the New York Court of Appeals in *German-American*

Coffee, to regulate foreign corporations doing business here. *See German-American Coffee*, 216 N.Y. at 67 ("the legislature [has] the power to make the wrongful act of the directors an offense against our laws, and to give the right of action to the corporation itself").

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

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

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

Id. at 422–23 (citing *Pessin & Chris-Craft Indus., Inc*., 181 A.D.2d 66, 70–71 (1st Dep't 1992)).

This Court is not alone in implementing §1319's statutory mandate and applying §626's gatekeeping rules to shareholder derivative actions involving

foreign corporations doing business in New York. In *Norlin Corp. v. Rooney, Pace, Inc*., 744 F.2d 255 (2d Cir. 1984), the Second Circuit similarly recognized the New York Legislature's decision to apply New York law to the issue of derivative standing, rather than deferring to foreign law under the internal-affairs doctrine:

> We find it unnecessary to adopt the [internal-affairs] choice of law ruling [defendant] urges, because the New York legislature has expressly decided to apply certain provisions of the state's business law to any corporation doing business in the state, regardless of its domicile. Thus, under [BCL] §1319, a foreign corporation operating within New York is subject, *inter alia*, to the provisions of the state's own substantive law that control shareholder actions to vindicate the rights of the corporation. [BCL] §626, made applicable to foreign corporations by §1319, permits a shareholder to bring an action to redress harm to the corporation, including injury wrought by the directors themselves.

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

The holdings in *Culligan* and *Norlin* are on point; and *Culligan* is binding. The lower court's disregard of *Culligan* is an error and must be reversed.

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

In opposing Defendants' motion to dismiss the verified FAC, Plaintiff urged the lower court to adhere to the holdings of *Culligan* and *Norlin* (*see* R932–933). But the lower court insisted upon applying the internal-affairs doctrine and refused to "accept the idea that the *Culligan* case dictates a different outcome." R45–46. In

finding that §1319 "[did] not override the internal affairs doctrine on the issue of standing" and "did not require application of New York law," the lower court relied on two decisions by other trial judges: *City of Aventura Police Officers' Retirement Fund v. Arison*, 70 Misc. 3d 234 (Sup. Ct. N.Y. Cnty. 2020), and *City of Philadelphia Board of Pensions & Retirement v. Winters*, Index No. 601438-20, slip op. (Sup. Ct. Nassau Cnty. Feb. 3, 2022) (R1240–1252). *Id.* But neither *City of Aventura* or *City of Philadelphia* can justify a departure from *Culligan*.

City of Philadelphia is inapposite. There, the key issue in dispute was whether the ECA or the English common-law rule of *Foss v. Harbottle*, 67 E.R. 189 (1843), governed the shareholder plaintiff's standing to sue Standard Chartered PLC, an English bank. *See City of Philadelphia*, slip op., at 9–13 (R1248–1252). The shareholder plaintiff in *City of Philadelphia* did not assert that §626(a)'s share-ownership requirement governed standing to sue.[15] Nor did the trial court rule on whether §1319 made §626 applicable. *See id*. Instead, the trial court presumed that the internal-affairs doctrine applied, and devoted its entire decision on choosing between two rules within English law. *See id*. The lower court's reliance on *City of*

[15] The shareholder plaintiff in *City of Philadelphia* appealed the trial court's dismissal order. The issues on appeal in the Second Department have nothing to do with the present issue on appeal before this Court: whether §1319 trumps the internal-affairs doctrine and requires the application of §626's gatekeeping rules governing shareholder derivative actions. *See City of Philadelphia Board of Pensions & Retirement v. Winters*, Docket No. 2022-01561, NYSCEF No. 7, Brief for Plaintiff-Appellant, at 5–6 (2d Dep't Sept. 2, 2022). That appeal remains pending in the Second Department.

Philadelphia is therefore misplaced.

City of Aventura fares no better. In deciding that §1319 did not "override the internal affairs doctrine on the issue of standing to bring a derivative claim," the trial court in *City of Aventura* did not even bother to cite §1319's text, which employs the phrase "shall apply"—unmistakably mandating the application of §626 to "foreign corporation[s] doing business in this state, [their] directors, officers and shareholders." N.Y. BUS. CORP. LAW §1319(a). Instead, the trial court erroneously and without analysis concluded that §1319 was not a conflict-of-law rule, but "a mere statutory predicate to jurisdiction." *See City of Aventura*, 70 Misc. 3d at 244. This erroneous view originated with *Lewis v. Dicker*, which held—as a "matter of first impression" and (again) without analysis—that §1319 "is not a conflict of laws rule, and [thus] does not compel the application of New York law." 118 Misc. 2d 28, 30 (Sup. Ct. Kings Cnty. 1982).

But, this rationale of denying that §1319 is "a conflict-of-law rule" cannot pass muster under settled rules of statutory construction. "Where the terms of a statute are clear and unambiguous, the court should construe it so as to give effect to the plain meaning of the words used." *Auerbach v. Bd. of Educ.*, 86 N.Y.2d 198, 204 (1995). 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. *See Anonymous v. Molik*, 32 N.Y.3d 30, 37 (2018). 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 N.Y., BOOK 1, STATUTES §§97–98 (1971).

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

Indeed, §1319 has no other purpose, but choice of law. It reflects a legislative policy choice to regulate certain aspects of the affairs of foreign corporations doing business in New York, including derivative standing to sue, which has been traditionally characterized as involving corporate "internal affairs." *See* Bill Jacket, L 1961, ch. 855, *Joint Report of Committees on Corporate Law of the New York State and New York City Bar Association*, at 32–35 (Jan. 25, 1961). And that was exactly how the New York Legislature, as well as the corporate establishment, understood §§1317 and 1319 to be: §1319 "*regulate*[*s*] *the internal affairs of foreign*

corporations[.]" *Id*. at 34–35. This was the view of both Professor Kessler and Dean Stevens, who participated in the drafting and public comments of the enactment of the 1961 BCL. *See* Stevens, *New York Business Corporation Law of 1961*, at 174 ("[a]pplicable to all foreign corporations are to the extent stated there in, … the other provisions of article 13, and the provisions relating to … derivative actions, and security for expenses therein"); Kessler, *The New York Business Corporation Law*, at 107 n.418 ("[t]he new statute attempts to" subject "foreign corporations to the same standards as local corporations" in §§1318–1320). And legal scholars agreed:

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

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

Moreover, the lower court's blind application of the internal affairs doctrine—in the face of contrary statutory directive—is plain error. Long gone is the era when the internal-affairs doctrine called for jurisdictional exclusivity for derivative actions only in the place of incorporation. *See*, *e.g.*, *Koster v. (Am.) Lumbermens Mut. Cas. Co*., 330 U.S. 518, 527 (1947) ("no rule … requires dismissal of a suitor from the forum on a mere showing that the trial will involve issues [relating] to the internal

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

By invoking the internal-affairs doctrine, the lower court effectively defied the mandate of New York's Foreign Corporation Statutes. But a court must "follow a statutory directive of its own state on choice-of-law." RESTATEMENT (SECOND) OF CONFLICTS OF LAW §6(1) (1988). A court defaults to various common-law choice-of-law rules *only* "[w]hen there is no such directive." *Id*. §6(2). "Provided that it is constitutional to do so, the court will apply a local statute in the manner intended by the legislature even when the local law of another state would be applicable under usual choice-of-law principles." *Id*., Cmt. b. on §6(1). BCL §1319 is exactly that kind of choice-of-law statute. The internal-affairs doctrine—a common-law choice-of-law rule —is inferior to statutory law and must give way. The lower court's decision to the contrary is an error and must be reversed.

5. Under BCL §1319 and §626, Plaintiff Has Standing Because It Has Sufficiently Alleged That It Is a Barclays Shareholder, and That Barclays Does Business in New York

Under settled law, Plaintiff must be accorded the "benefit of every possible inference" on a motion to dismiss. *People v. Sprint Nextel Corp*., 26 N.Y.3d 98, 113

(2015); *see also Leon*, 84 N.Y.2d at 87. Therefore, Plaintiff's verified FAC must be liberally construed, and all facts alleged in the FAC, along with any submissions in opposition to the dismissal motion, must be accepted as true. *511 W. 232nd Owners Corp.*, 98 N.Y.2d at 152.

Here, Plaintiff—a New York corporation with its principal place of business in Manhattan—alleges that it has continuously owned Barclays shares during the entire time period of Defendants' continuous course of misconduct. R750 (¶30). This verified allegation is more than enough to meet the pleading requirement under §626. *See 511 W. 232nd Owners Corp.*, 98 N.Y.2d at 152.

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

The "doing business" standard under §1319 is minimal and straightforward; defendant "must take some act by which [it] purposefully avails itself of the privilege of conducting activities within the forum State." *Ford Motor Co. v. Montana Eighth Judicial Dist. Ct*., 141 S. Ct. 1017, 1024 (2021). In *Ford Motor*, the underlying company "is a global auto company. It is incorporated in Delaware and headquartered in Michigan. But its business is everywhere." *Id*. at 1022. The same can be said of Barclays; its business is everywhere, more specifically, its "home office" is in Midtown Manhattan. Barclays itself has admitted as much in filings with federal banking authorities:

> About Barclays
>
> Overview of Barclays
>
> Barclays PLC operates via two clearly defined divisions — Barclays UK and Barclays International — with a diversified business model that we believe helps enhance our resilience to changes in the external environment[.]
>
> *The Strategy of Barclays PLC (BPLC) is to build on our strength as transatlantic consumer and wholesale bank, anchored in our two home markets of the UK and US*, with global reach. Our two clearly defined divisions, Barclays UK and Barclays International, provide diversification to our business model.

R985. Virtually the same language is found in many Barclays publications, including the website for Barclays Center in Brooklyn. R1032. This strategy animates the "Power of One Barclays" marketing slogan. *See* R937.

In the lower court, Defendants argued that Barclays PLC only does business

in New York through subsidiaries. *See* R65–66. But that is the nature of a "holding company." Setting up on paper this way, however, does not insulate foreign corporations from the reach of New York courts. In *Airtran*, for example, this Court made short work of this holding-company dodge:

> Defendant claims to be no more than a holding company, which does not conduct business directly, but only through its subsidiary. The parent-subsidiary relationship is enough to give rise to a strong inference of a broad agency relationship. Where ... the subsidiaries are created by the parent … to carry on business on its behalf, there is no basis for distinguishing between the business of the parent and the business of the subsidiaries. In such circumstances, there is a presumption, in effect, that the parent is sufficiently involved in the operation of the subsidiaries to become subject to jurisdiction.

46 A.D.3d at 219 (cleaned up). Similarly, the court in *Ingenito v. Riri USA, Inc*., found jurisdiction over a Swiss holding company against the same arguments as Barclays makes here:

> A plaintiff attempting to establish personal jurisdiction over a defendant who has never been present in the state and only acted through subsidiaries or agents need only show that the subsidiary "engaged in purposeful activities in this [s]tate," that those activities were "for the benefit of and with the knowledge and consent of" the defendant, and that the defendant "exercised some control over" the subsidiary in the matter that is the subject of the lawsuit.

89 F. Supp. 3d 462, 476 (E.D.N.Y. 2015) (quoting *Kreutter v. McFadden Oil Corp*., 71 N.Y.2d 460, 467 (1988)).

Such a showing is easy in this case. "Purposeful activities" by Barclays' entities in its second "home market" here in New York abound, and are "for the

benefit and with the knowledge and consent of" Barclays. Here, Defendants cannot overcome *Airtran*'s "presumption … that the parent is sufficiently involved in the operation of the subsidiaries to become subject to jurisdiction." 46 A.D.3d at 219. "Some control over the subsidiary" cannot be contested. As Barclays states on its own website:

> [The Barclays PLC Board is responsible for] set[ting] the strategic direction and risk appetite of the Group and is the ultimate decision-making body for matters of Group-wide strategic, financial, regulatory or reputational significance.

R1033. Board control is exercised through a series of direct delegations of authority:

> Oversight for the day-to-day management of the business activities of Barclays is delegated by the BPLC Board to the Barclays Chief Executive. In turn, the Barclays Chief Executive delegates certain of his powers and authorities, through a series of personal delegations to the Group Executive Committee to assist him in the execution of his responsibilities.

R1028; *see also* R786–787 (¶103).

Other *indicia* of "purposeful availment" exist. For example, Barclays has commenced plaintiff-side litigation in New York and defended cases here without jurisdictional challenges. R970–971. Barclays is deeply intertwined with federal and New York banking regulators. *See* R734–735 (¶5), R817–818 (¶162), R821–823 (¶¶170, 174), R836–840 (¶¶197, 202), R844 (¶209), R887–888 (¶289). And Barclays regularly comes to New York to tap its debt and equity markets for billions of dollars. In this connection, Barclays' officers regularly make presentations to

securities analysts in New York. R972–973. Barclays' Board and its Board committees have held over 15 meetings in NY between 2010 and 2019. R974.

More importantly, Barclays has explicitly consented to New York jurisdiction in multiple agreements relating to this action. The FAC alleges Barclays' millions of shares of common stock are represented by shares of common stock, including American Shares. R750 (¶31). Plaintiff owned American Shares for years before converting to common stock. R750 (¶30). Barclays' American Shares, registered with the SEC, trade in the United States. They are the same as Barclays' common stock in every material respect, and have all the legal rights as the common shares, including standing to assert claims derivatively for Barclays. R895–896 (¶304). The American Shares are held by JPMorgan in New York ("JPMorgan"), acting as depositary. *See* R895 (¶303).

The Depositary Agreement for Barclays' American Shares (as filed with the SEC in Registration Statements signed and/or approved by Barclays' directors) states Barclays consented to the jurisdiction of New York courts in New York County and agreed that New York law applies to the Depositary Agreement (R895 (¶303)):

> The Company [Barclays PLC] irrevocably agrees that any legal suit, action or proceeding against the Company brought … any Holder, arising out of or based upon this Deposit Agreement or the transactions contemplated hereby, shall be instituted in any state or federal court in New York, New York and irrevocably waives any objection which it may now or hereafter leave to the laying of venue

> of any such proceeding and irrevocably submits to the exclusive jurisdiction of such courts in any such suit, action or proceeding….

This agreement (R1266–1320) also provides "This Deposit Agreement and Receipts shall be interpreted … and … shall be governed by the laws of New York." R1300.

In addition, Barclays and its subsidiaries have entered into multiple settlement agreements and consent orders, as pleaded in the FAC, that gave rise to this action. In Barclays' 2016 $100 million settlement with various Attorneys General, including the NYAG, for LIBOR misconduct (*see* R1321–1392), Barclays agreed that the state or federal courts in New York shall be the "exclusive forum" for any action to enforce or interpret the terms of the settlement agreement, and "consent[ed] to the jurisdiction of the courts of … New York," and agreed that "New York law shall apply." R1337–1338. Similar consent-to-jurisdiction and choice-of-New York law provisions can be found in additional agreements, including:

- 2014 Settlement Agreement with the Federal Housing Finance Agency and others settling federal and New York state litigation relating to both Toxic Securities and LIBOR for $280 million (R1393–1424);
- May 19, 2015 and November 17, 2015 Consent Orders with the NYSDFS agreeing to pay $485 million and $150 million respectively (R1425–1451);
- January 2016 Settlement Agreement with the NYAG regarding its electronic trading/dark pools misconduct, paying a $70 million penalty (R1466–1480); and

- August 2010 deferred prosecution agreements with the District Attorney of New York County and federal authorities to resolve allegations of misconduct for money laundering for $298 million in penalties (*see* R1264; *see also* R1481–1546).

In light of the foregoing, Defendants cannot be allowed to renege on Barclays' prior consents to New York jurisdiction and evade the application of New York law. In fact, as a matter of law, Defendants are precluded from seeking dismissal of the FAC based on *forum non conveniens*. *See* CPLR 327(b) (the court shall not stay or dismiss any action on the ground of inconvenient forum, where the action arises out of or relates to a contract, agreement or undertaking to which section 5-1402 of the general obligations law applies, and the parties to the contract have agreed that the law of this state shall govern their rights or duties in whole or in part"); *see also Lumbermens Mut. Cas. Co. v. Commonwealth of Pa*., 52 A.D.3d 212, 212 (1st Dep't 2008) ("In enacting General Obligations Law §5-1402 and CPLR 327(b), the Legislature made explicit that public policy favors New York courts retaining actions against foreign states where a choice of New York law has been made and the foreign state agreed to submit to New York jurisdiction.").

* * *

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

shareholders of foreign corporations to pursue derivative actions in New York courts under New York's gatekeeping rules, including BCL §626,[16] while applying the substantive law (duties/liabilities) of the place of incorporation via the statutory causes of action under BCL §720 and BL §7017 imposing liability on defaulting directors and officers "as in the case of a domestic corporation." *See Rapoport v. Schneider*, 29 N.Y.2d 396, 400 (1972) ("The … statute … embrace[s] common law and statutory causes of action imposing liability on directors … and covers every form of waste of assets and violations of duty whether as a result of intention [or] negligence."); *see also Goldberg v. Meridor*, 567 F.2d 209, 209 (2d Cir. 1977) (Friendly, J.) (applying BCL §720 to a Panamanian corporation).

All told, Plaintiff is a shareholder of Barclays and is entitled under §626 to bring a derivative action on Barclays' behalf because it does business in New York within the meaning of §1319. The text and legislative history of New York's Foreign

[16] BL §6025 mirrors BCL §626 and provides the gatekeeping rules for shareholder derivative actions brought on behalf of banking corporations. *See* N.Y. BANKING LAW §6025. Similar to BCL §720, BL §7017 also provides causes of action against directors and officers of banking corporations. *Id.* §7017. Barclays maintains a major banking operation in New York (*e.g.*, R892–893 (¶¶297, 299), just like Bank of America Corporation ("BofA") and Citigroup, Inc. ("Citigroup"), which are incorporated outside New York. Barclays is subject to the BCL or the BL—one or the other, *i.e.*, the Foreign Corporation Statutes, which create subject-matter jurisdiction over derivative actions and provide causes of action against the directors and officers of foreign corporations, as well as gatekeeping rules for derivative actions to proceed "in the same manner as a domestic corporation" (*see* N.Y. BUS. CORP. LAW §1317(b)). *See David Shaev Profit Sharing Plan v. Bank of Am.*, 2014 N.Y. Misc. LEXIS 6470, at **5–6 (Sup. Ct. N.Y. Cnty. Dec. 29, 2014) (BCL §§626 and 1319 apply to BofA); *Shaev v. Pandit*, 2014 N.Y. Misc. LEXIS 1418, at *8 (Sup. Ct. N.Y. Cnty. Jan. 24, 2014) (BL §§6025 and 7017 apply to Citigroup).

Corporation Statutes, as well as precedents such as *Culligan*, command that §626 be applied to determine Plaintiff's derivative standing to sue. New York courts must follow the Legislature's directives.

The lower court's decision to the contrary is an error because the Foreign Corporation Statutes have displaced the internal-affairs doctrine. By dismissing this action brought by a New York-based shareholder, the lower court has effectively abdicated the jurisdiction over shareholder derivative actions conferred by §626. This is an error and must be reversed.

B. English Procedural Requirements to Bring a Derivative Claim in England—Being a "Member of the Company" and an Owner of "Registered Shares"—Are Applicable Only to Derivative Actions Brought in English Courts and Are Thus Inapplicable to This Derivative Action Brought in a New York Court

Davis and *HSBC* require that BCL §626—New York's own gatekeeping rules—be applied to this action because ECA §§260–263 are procedural and applicable only to shareholder derivative actions brought in English courts. In *Davis*, a shareholder derivative action brought on behalf of a Cayman Islands corporation, the Court of Appeals affirmed the common-law principles that "procedural rules are governed by the law of the forum," and that New York law determines whether a given question is one of substance or procedure." 30 N.Y.3d at 252, 257. There, the trial court dismissed the action on the basis that plaintiff failed to "establish[] standing because he did not seek leave of court to commence a

derivative action under rule 12A of order 15 of the Cayman Islands Grand Court Rules." *Id*. at 250. Affirming the trial court, this Court found that the Cayman Islands rule at issue (Rule 12A) was substantive and was thus applicable to the action under the internal-affairs doctrine.[17] *See id*. Reversing the affirmance, the Court of Appeals held that the Cayman Islands Rule 12A was "procedural, and therefore [did] not apply where, as here, a plaintiff [sought] to litigate his derivative claims in New York." *Id*. In so holding, the Court of Appeals reasoned that the language, purpose, and operation of Rule 12A demonstrated that the rule was procedural—"serv[ing] a gatekeeping function … as to derivative actions brought in the Cayman Islands":

> We first look at the *plain language* of rule 12A …. Rule 12A states that it pertains to all derivative actions "begun by writ," and that the trigger for applying to the Grand Court occurs when the defendant has "given notice of intention to defend." … *Both procedures are specific to Cayman Islands litigation*. The term "writ" is clearly inapplicable to jurisdictions, such as New York, in which such actions are not commenced by writ. Additionally, under the Grand Court Rules, the defendant acknowledges service of the writ by completing a specified form which includes a box to be checked off indicating the intent to defend …. Under this analysis, *rule 12A is a procedural rule that does not apply in New York courts*.

Id. at 253–54. In addition, the Court of Appeals pointed to the fact that Rule 12A imposed the permission-seeking procedure only as to actions brought in the Cayman Islands, but "not for derivative actions, wherever brought, concerning Cayman

[17] The parties in *Davis* agreed that the internal-affairs doctrine applied, and disputed only whether Cayman Islands Rule 12A requiring leave of court to bring a derivative action was procedural or substantive.

companies specifically." *Id*. at 254.

The reasoning of *Davis* squarely applies here and compels the finding that ECA §§260–263 are procedural rules and are thus inapplicable to shareholder derivative actions brought in courts outside England. ECA §§260–263's texts are explicit and determinative on this point. Those three sections appear in Chapter 1 of the ECA under Part 11, which is entitled "DERIVATIVE CLAIMS *IN ENGLAND AND WALES OR NORTHERN IRELAND*." COMPANIES ACT 2006, Chapter 1, Part 11 (title); R961.[18] As expressly provided in ECA §260 (entitled "Derivative Claims"), "*this Chapter applies to proceedings in England and Wales or Northern Ireland by a member of a company*," "in respect of a cause of action vested in the company" and "seeking relief on behalf of the company." COMPANIES ACT 2006 §260(1). Likewise, ECA §261, entitled "[*a*]*pplication for permission to continue derivative claim*," expressly provides that the "permission-" or "leave-" application procedure applies only to English courts: "[a] member of a company who brings a derivative claim under this Chapter must apply to *the court for permission* (*in Northern Ireland*, *leave*) to continue it." COMPANIES ACT 2006 §261(1); R962. ECA §§262 and 263 also refer to the courts in England, Wales, and Northern Ireland—so specific as to employing the term "leave" in place of "permission" to comply with Northern

[18] The texts of ECA §§161, 174, 178, 179, 232, 260, 261, 262, and 263 can be located at R254–264.

Ireland's practice. *See* COMPANIES ACT 2006 §§262(2), 263(1); R962–963.

Under *Davis*, ECA §§260–263 can be interpreted only as procedural rules because, just like the Cayman Islands Rule 12A, these ECA sections—employing terms specific to the practices of English courts—serve the gatekeeping function solely for actions brought there. Such practice of "apply[ing] to the court for permission" to "continue" a derivative action is non-existent in New York courts. *See* N.Y. BUS. CORP. LAW §§626–627. And, just like the lack of extraterritorial reach of the Cayman Islands rules in *Davis*, nothing in the ECA indicates that §§260–263's requirement of a "member" to seek permission to sue in English courts can be applied to derivative actions brought outside England on behalf of English companies. *See Davis*, 30 N.Y.3d at 254.

This is exactly the holding in *HSBC*, where the Second Department applied New York law, rather than English law, to a shareholder derivative action brought on behalf of HSBC Holdings PLC, an English corporation. *See* 166 A.D.3d at 757. There, the trial court dismissed the action, finding that plaintiff failed to comply with ECA §260's requirement to seek permission to sue. *Id*. Adopting the reasoning in *Davis*, the Second Department refused to apply ECA §260's requirements because they were procedural. *See id*. Instead, the Second Department applied BCL §626 and sustained the pleading sufficiency of the complaint based on New York's own gatekeeping rules governing derivative actions. *See id.* at 758–59.

Davis and *HSBC* are on point and controlling. They provide an alternative—but no less mandatory—basis to BCL §1319 to apply §626's gatekeeping rules to this action. Under *Davis* and *HSBC*, this Court must apply BCL §626's provision permitting all holders of shares, and beneficial interest in such shares, of a foreign corporation to bring derivative actions on behalf of the corporation. N.Y. BUS. CORP. LAW §626(a). As alleged in the verified FAC, Plaintiff owns 2,500 shares of Barclays' common stock. R750 (¶30). Under BCL §626(a), Plaintiff has standing to bring this action on behalf of Barclays. *See* N.Y. BUS. CORP. LAW §626(a). The lower court's decision to the contrary—applying ECA §260 instead of BCL §626—must be reversed.

II. This Court Should Reverse Because, Even If ECA §260 Can Be Properly Applied, Plaintiff's Verified Allegations of Stock Ownership Establish Standing to Sue at the Pleading Stage

Even assuming that ECA §260's "membership" requirement can be properly applied (it cannot), the lower court erred in granting Respondents' CPLR 3211 motion based on an affirmation of a Barclays employee that directly contradicts Plaintiff's verified allegations of its stock ownership. Specifically, the lower court relied on two statements in a May 13, 2021 affirmation of one Hannah Ellwood, who claims to be Barclays' Assistant Company Secretary (R717–721):

> The Barclays PLC share register is maintained by its registrar, Equiniti Limited and Equiniti Financial Services Limited (together, "Equiniti"). Having made reasonable enquires of Equiniti, neither Ezrasons, Inc., Ezra Cattan, nor Jack Cattan appear in their own

> name in the records of Equiniti as a registered, legal owner of Barclays PLC shares as of April 30, 2021.

R719. By relying on these statements in the Ellwood affirmation, the lower court committed three legal errors.

First, the lower court is precluded from considering Ellwood's affirmation because, on a CPLR 3211 motion, the court's "analysis of a plaintiff's claims is limited to the four corners of the pleading." *Nomura Home Equity Loan, Inc., Series 2006-FM2 v. Nomura Credit & Capital, Inc*., 133 A.D.3d 96, 105 (1st Dep't 2015). This rule applies here with greater force because Respondents failed to invoke CPLR 3211(a)(1)—"a defense … founded upon documentary evidence"—in the lower court. *See* R51. Instead, Respondents moved to dismiss under only paragraphs (2), (3), and (7) of CPLR 3211(a). R51. As a result, Respondents waived any defense under paragraph (1) of CPLR 3211(a). *See* CPLR 3211(e). This waiver precludes the lower court from considering *any* "documentary evidence" in connection with Respondents' CPLR 3211 motion. *M&E 73-75, LLC v. 57 Fusion LLC*, 189 A.D.3d 1, 6 (1st Dep't 2020). Accordingly, the lower court's consideration of the Ellwood affirmation constitutes an error. *See id*.

Second, even if the Ellwood affirmation can be properly considered (it cannot), the statements at issue are inadmissible hearsay. Nothing in Ellwood's affirmation indicates that she actually reviewed Barclays' "share register." *See* R51. Instead, Ellwood simply made "reasonable enquires" of a third party and attempted

to relay such third party's statements. *See id*. The "statements of a nontestifying third party" in Ellwood's affirmation are classic hearsay. *See People v. Brensic*, 70 N.Y.2d 9, 15 (1987). The lower court's reliance on hearsay statements is an error and must be reversed. *See id*.

Finally, even if these third-party hearsay statements are admissible (they are not), they do not constitute "documentary evidence" capable of "conclusively establishing a defense" based on Plaintiff's membership in Barclays. *See Goshen v. Mut. Life Ins. Co. of N.Y.*, 98 N.Y.2d 314, 326 (2002). At the outset, an affirmation "submitted by defendants [is] not 'documentary evidence' within the meaning of CPLR 3211(a)(1)." *Flowers v. 73rd Townhouse LLC*, 99 A.D.3d 431, 431 (1st Dep't 2012).

More importantly, even if Ellwood's third-party statements constitute "documentary evidence" (they do not), they "merely raise[] factual issues not amenable to resolution on a motion to dismiss on the pleadings." *Birencwajg v. Compaore*, 200 A.D.3d 404, 405 (1st Dep't 2021). This is because Plaintiff alleges, in its *verified* FAC, that its Barclays "shares are registered with Barclays," and that it is a "member of the company" under the ECA. R750 (¶30). Plaintiff's verified allegations carry the weight of evidence. *See* CPLR §105(u); *see also Fortino v. Hersch*, 307 A.D.2d 899, 899 (1st Dep't 2003) (reversing the trial court for failing to give due weight to "verified pleadings which … 'may be utilized as an affidavit'").

Despite Plaintiff's verified allegations, which must be accepted as true, *511 W. 232nd Owners Corp.*, 98 N.Y.2d at 152, the lower court mistakenly latched onto a purported "admission" by Plaintiff's counsel that Plaintiff was not a "member" of Barclays. R44–45. But in fact, at the April 26, 2022 hearing, counsel reminded the lower court that Plaintiff made no such admission, and that Plaintiff's membership status "would be a matter of discovery." R26–27. Still, the lower court rejected Plaintiff's verified allegations of its membership in Barclays, and gave weight to Ellwood's third-party hearsay statements that Plaintiff's name did not appear in Barclays' share registry. *See* R36. The lower court's decision is an error and must be reversed. *See*, *e.g.*, *Birencwajg*, 200 A.D.3d at 405 (affirming order denying a CPLR 3211(a)(1) motion); *DeStaso v. Condon Resnick, LLP*, 90 A.D.3d 809, 936 (2d Dep't 2011) (reversing a dismissal because defendants "did not conclusively establish that plaintiff had no cause of action; rather, they merely disputed certain factual allegations contained in the complaint").

CONCLUSION

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

Dated: New York, New York
January 3, 2023

Respectfully submitted,
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