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 Motions to Dismiss the Verified Shareholder Derivative Complaint Based on Personal Jurisdiction, *Forum Non Conveniens*, and Failure to Make Pre-Suit Demand

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I. INTRODUCTION AND OVERVIEW[1]

The Bayer Defendants seek dismissal of the verified Second Amended Complaint ("SAC") for lack of personal jurisdiction and on *forum non conveniens* ("*FNC*") grounds. Bayer AG ("Bayer") also argues for dismissal based on failure to make pre-suit demand under NY Business Corporation Law ("BCL") §626. Their arguments are meritless.

Personal jurisdiction over the Bayer Defendants—Bayer Corporation and the Individual Defendants—is proper given Bayer's historic NY contacts and the extensive NY nexus of Bayer's acquisition of Monsanto Company (the "Acquisition"), its financings and the related botched settlement. Bayer has been doing business in NY for 150 years; has repeatedly sued ***and*** been sued in NY and repeatedly made presentations to the NY financial community to access U.S. capital markets. ***The Acquisition details were negotiated in NY***. ***The deal was signed and closed in NY***. ***And the deal was funded by the sale of billions of Bayer securities in***, ***and from***, ***NY***. The Bayer Supervisors (Directors) and Managers (Officers) directed these activities and personally benefited from them as "***primary actors***." *See In re Renren Inc. Derivative Litig.*, 2020 N.Y. Misc. LEXIS 2132, at **39–56 (Sup. Ct. N.Y. Cnty. May 20, 2020). In 2017, the Bayer and Monsanto CEOs even dined with the President-Elect in Trump Tower in an effort to "persuade" the U.S. Department of Justice ("DOJ") to approve the Acquisition.

[1] On a CPLR §3211(a)(7) motion, the court must afford the pleadings a liberal construction and accept the facts alleged in the complaint as true, according the plaintiff the benefits of every favorable inference. *Morone v. Morone*, 50 N.Y.2d 481, 484 (1980). A §3211(a)(1) motion may be granted "only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v. Mut. Life Ins. Co.*, 98 N.Y.2d 314, 326 (2002).

These NY contacts/nexus create specific personal jurisdiction that comports with due process.

Those same NY contacts/nexus cement Plaintiffs' "***presumptive entitlement***" to select NY as forum. The Bayer Defendants claim that German Stock Corporation Act ("GSCA")[2] §148 and Article 3 of Bayer's Articles ("BA3") require Plaintiffs to travel to Germany to seek permission to sue from a German court. However, §148 and BA3 contain no jurisdictional language or the term "***exclusive***." Nor can §148 or BA3 block or displace this Court's inviolable subject-matter jurisdiction—created by BCL §§1319/626 over this derivative suit involving a foreign corporation doing business in NY. *See* Standing Br. at 18–19.[3] Nor does GSCA §148 or BA3 have any impact on the forum/venue for this case, ***as they do not contain the words*** "***venue***" ***or*** "***forum***," let alone "***exclusive***."

Plaintiffs—as U.S./NY residents—have a "***presumptive entitlement***" to sue here invoking this Court's subject-matter jurisdiction, which is given extra weight since the alternative forum is in a foreign land. *Swift & Co. Packers v. Compania Colombiana del Caribe*, 339 U.S. 684, 697 (1950) ("***a suit by a United States citizen against a foreign respondent brings into force considerations very different from those in lawsuits between foreigners***"). Defendants have not carried their "***heavy burden***" to show "***substantial inconvenience, amounting to oppression***" to them in defending in NY that

[2] Relevant excerpts from the GSCA and the BCL are attached as Addendum A and Addendum B.

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

is required to overcome NY/U.S. residents' ***presumptive entitlement*** to litigate claims with a NY nexus in this Court.

Bayer concedes that NY's gatekeeper rules control by basing their demand-futility argument on NY law (BCL §626(c)). But this argument fails. ***The Acquisition was the third consecutive U.S. acquisition by Bayer to fail due to inadequate due diligence***. The due-diligence failure here was epic: ***as part of a pattern of diligence failings***, it could not have been the product of honest, good-faith business judgment. Bayer's Directors also acted with an improper entrenchment motive depriving them of any presumption of any business-judgment protection. Because of the "***illegal purpose, magnitude and duration of the alleged wrongdoing***," *Mason-Mahon v. Flint*, 166 A.D.3d 754 (2d Dep't 2018) ("*HSBC*"), making demand on the Directors to sue themselves and the Banks they worked with would be a "fool's errand" and is excused under NY law.

II. ARGUMENT

A. The Bayer Defendants' Extensive NY Contacts and Their Underlying Wrongdoing's NY Nexus Create Specific Personal Jurisdiction Consistent with Due Process

1. Bayer's NY Contacts and NY Nexus

Bayer has extensive legal and financial ties to U.S./NY. Bayer's stockholders and operating businesses are much more concentrated in the U.S. than in Germany. Close to 30% of Bayer shares are held by U.S. residents—compared to just 20% in Germany. Bayer has 15 U.S. operations compared to 14 in Germany. Bayer has 22,500 employees in the U.S. Bayer's 2019 U.S. sales exceeded €13.5 billion—31% of its worldwide total,

compared to German sales of only €2.4 billion. Bayer's U.S. assets are 350% greater than in Germany. ¶¶70–73, 270.[4]

Bayer's ADS/ADRs trade in the U.S. with BNY Mellon as depositary, and are owned by thousands of U.S. residents. They are registered with the Securities and Exchange Commission and are the equivalent of the Bayer common stock owned by Plaintiffs. Bayer's Supervisors must comply with U.S. laws regarding both. ¶¶255–258, 269. Bayer's ADR/ADS Deposit Agreement with BNY Mellon provides it "shall be governed by the laws—of the State of [NY]" (§7.6 or §7.8) and that Bayer "***consents and submits to the non-exclusive jurisdiction of any state or federal court in the County of*** [***NY***]." ¶¶255–258, 269; Affirmation of Albert Y. Chang ("Chang Aff.") ¶2, Ex. 1.

Bayer is involved in countless litigations throughout the U.S. as defendant. Not only the 125,000-plus Roundup lawsuits and some 400 Dicamba lawsuits, but hundreds of other individual, class-action and mass-tort lawsuits in NY and elsewhere. As Baumann says "***we have quite a bit of experience in U.S. products litigation***." ¶¶172–174. ***Bayer has also sued as a plaintiff in at least five cases in S.D.N.Y.***:[5]

- *Bayer Aktiengesellschaft v. Maximum Life Labs*, No. 1:11-cv-5037;
- *Bayer Aktiengesellschaft v. E. Merck oHG*, No. 1:06-cv-4475;
- *Bayer AG v. Barr Laboratories, Inc.*, No. 1:92-cv-0381;
- *Bayer AG v. Chase Chemical Co.*, No. 1:88cv7895; and

[4] The allegations of the Second Amended Complaint ("SAC") (NYSCEF No. 35) are cited as ¶__. Unless otherwise noted, all emphases in quoted texts are added, and all internal citations are omitted.

[5] Bayer's wholly owned U.S.-based subsidiary (Bayer Corporation) has filed at least 55 cases in federal (15) and state (40) courts in NY. *See* Chang Aff. ¶3.

- *Bayer AG v. Kalipharma, Inc.*, No. 1:88cv7735.

Chang Aff. ¶3.

The Acquisition was centered in the U.S.—***NY specifically—and so is the fallout***. Monsanto was a NYSE-listed company. Both sides of the Acquisition were represented by NY-based law firms: ***Sullivan & Cromwell*** (***S&C***) for Bayer and ***Wachtell Lipton Rosen & Katz*** (***WLRK***) for Monsanto. ¶271. The Acquisition details ***were negotiated***, ***and the deal was signed in NY in September 2016***:

> Final talks took place in ***NY***, culminating in a tete-a-tete dinner Tuesday evening between Baumann and Grant at Aretsky's Patroon, an upscale America restaurant in ***midtown Manhattan***—while advisers dined on chicken and pasta at the office as they hammered out the final aspects of the deal.

Matthew Campbell *et al.*, *Behind Bayer-Monsanto, an Odd Couple out to Rule the World*, BLOOMBERG, Sept. 14, 2016 (Chang Aff. Ex. 2).

The Acquisition closed in June 2018 at S&C's NY office. Chang Aff. ¶5 & Ex. 3 at 2. Before the closing, the Bayer and Monsanto CEOs had dinner with President-Elect Trump ***in NY*** to get the DOJ to "clear" the deal. ¶¶275–278. ***WLRK—Monsanto's counsel for the Acquisition—now represents the Bayer Defendants in this suit and in securities class-action lawsuits brought by ADR/ADS purchasers based on false statements regarding the Acquisition made by the Bayer Defendants to the U.S./NY financial markets***. Chang Aff. Ex. 3 at 77. The botched settlement was created—and the Roundup litigation morass is overseen—by Skadden law firm's NY office, counsel to Bayer's Glyphosate Litigation Committee. ¶¶37, 136–191, 271–272.

For years, Bayer executives exploited NY's capital markets, making investor presentations here, several of which included information ***about the Acquisition—pre- and post-***. Chang Aff. ¶6. To the extent due diligence was done, it was done out of the

NY offices of S&C and the Banks. The Roundup litigations and the witnesses concerning and incriminating evidence of Monsanto's potential liability for those claims, the Dicamba and other Monsanto Legacy toxic-tort liabilities, *i.e.*, ***what competent, unconflicted due diligence would have uncovered***, are 95% located in the U.S. ¶¶176–182, 246–247.

The "Acquisition financings" were also centered in NY. Billions of dollars of Bayer securities were sold in and out of NY to help pay down the Banks' $60-billion "bridge loan," to raise cash to pay for the Acquisition. This included $15 billion in new Bayer notes/bonds, a $14-billion convertible-debt offering, a $8-billion equity offering and refinancing of 16-plus issuances ($7 billion) of Monsanto debt. ¶¶273–274.

These offerings were indispensable steps in the Acquisition. The huge note-offering was centered in NY and targeted NY institutional investors. These notes were governed by NY law. The offering was led by the Banks in NY, where ***the Fiscal, Paying, Transfer, Escrow, Registrar and Calculation Agent was Deutsche Bank at 60 Wall Street. The billions of dollars that changed hands in the Acquisition flowed in and through NY financial institutions***. ¶274.

2. Specific Personal Jurisdiction over Bayer and the Individual Defendants Is Proper Under CPLR §302(a)(1)[6]

The Court has specific personal jurisdiction over the Bayer Defendants. CPLR §302(a)(1) authorizes personal jurisdiction "over any non-domiciliary … ***who in person***

[6] The SAC's allegations, taken as true, "demonstrate, *prima facie*, that [Bayer] transacted business in NY in connection with the plaintiffs' causes of action" and warrant denial of the Bayer Defendants' motion. *Cornely v. Dynamic HVAC Supply, LLC*, 44 A.D.3d 986, 987 (2d Dep't 2007); *see also Nick v. Schneider*, 150 A.D.3d 1250, 1251 (2d Dep't 2017) ("[t]he facts alleged in the complaint … are deemed true" at the pleading stage).

or through an agent … ***transacts any business*** within [NY]." Thus, even if a company "***never enters*** [***NY***]," §302(a)(1) provides for personal jurisdiction where (1) that company engages in sufficient activities in NY to have "transacted business in [NY]," and (2) "the claims … arise from the transactions." *Rushaid v. Pictet & Cie*, 28 N.Y.3d 316, 323 (2016); *see also Renren*, 2020 N.Y. Misc. LEXIS 2132, at **39–56.

A corporation is the "agent" of its officers and directors within the meaning of §302(a)(1), where those individuals are "***primary actors***" in the corporation's transaction of business in NY. *Kreutter v. McFadden Oil Corp.*, 71 N.Y.2d 460, 467 (1988) (rejecting "fiduciary-shield doctrine" and holding that specific personal jurisdiction applies "over an individual who was a primary actor" for an entity).[7] Here, the Supervisors were "primary actors" behind the Acquisition, its financings and the botched settlement. ***They authorized all those actions, which constitute Bayer's doing business in NY and thus their own transaction of business in NY through their agent Bayer, and its lawyers***. *See Renren*, 2020 N.Y. Misc. LEXIS 2132, at **57–78.

Under §302(a)(1)'s first prong, "jurisdiction is proper" so long as the non-domicile activities in NY were "***purposeful***." *Id.* at *68. "Purposeful activities are those

[7] Where a corporation engages in purposeful activities within NY with respect to the subject transaction with the knowledge and consent of a Director/Officer, the court has personal jurisdiction over the individual defendant by virtue of the corporation's activities, where that defendant ***benefited*** from the transaction and exercised ***some degree of control over the corporation in relation to the transaction***. *Retail Software Servs., Inc. v. Lashlee*, 854 F.2d 18, 21–22 (2d Cir. 1988). A plaintiff asserting personal jurisdiction over a defendant based on the actions of his or her corporate agent need not establish a formal agency relationship. *Kreutter*, 71 N.Y.2d at 467. The plaintiff "need only convince the court that [the] transaction was for the benefit of and with the knowledge and consent of the … defendants and that they exercised some control over [the] Company in the matter." *Id.* To satisfy the element of control, the plaintiff must allege in sufficient detail that the defendant was a primary actor in the subject transaction. *Coast to Coast Energy, Inc. v. Gasarch*, 149 A.D.3d 485, 487 (1st Dep't 2017).

with which [an entity], through volitational acts, 'avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Fischbarg v. Doucet*, 9 N.Y.3d 375, 380 (2007). Because §302(a)(1) is a "***single***[-]***act statute***," "***one transaction*** is sufficient to invoke jurisdiction." *Wilson v. Dantas*, 128 A.D.3d 176, 181 (1st Dep't 2015).

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

Here the connection is direct. While Bayer conducts billions in business in NY through its wholly owned subsidiary (agent) Bayer Corporation, Bayer itself has many direct NY contacts relating to the wrongdoing alleged and the claims asserted. Whether the "transaction" is viewed as the Acquisition, its financings or the botched settlement—each "transaction" was a ***Bayer*** "transaction" that individually, and certainly collectively, obliterate any personal-jurisdiction challenge by either Bayer or the Supervisors who authorized that conduct and benefited from it as "primary actors."

Bayer's NY contacts were not mere happenstance, they were "purposeful," "volitional," actions essential to carry out the wrongdoing complained of. *D&R Global Selections, S.L. v. Bodega Olegario Falcon Pineiro*, 29 N.Y.3d 292, 297–98 (2017). The Supervisors benefited from, knew of and consented to, and exercised more than the

requisite control ("some control") over Bayer regarding, the Acquisition, making each of them a "***primary actor***" for jurisdictional purposes. *Kreutter*, 71 N.Y.2d at 467; *see also, e.g.*, *Renren*, 2020 N.Y. Misc. LEXIS 2132, at **56–68 (exercising jurisdiction over a "primary actor"); *Aviles v. S&P Global, Inc.*, 380 F. Supp. 3d 221, 260–264 (S.D.N.Y. 2019) (defendant individual subject to §302(a)(1) for corporation's act); *In re Sumitomo Copper Litig.*, 120 F. Supp. 2d 328, 336–38 (S.D.N.Y. 2000); *Retail Software*, 854 F.2d at 21–22.

Indeed, by conducting Bayer's business in NY, the Bayer Directors and Officers have consented to both NY's jurisdiction and the applicability of NY law. By enacting BCL Article 13, the NY Legislature has imposed as "conditions" to doing business here the applicability of certain BCL provisions. *See* BUS. CORP. LAW §1319; *see also German-American Coffee Co. v. Diehl*, 216 N.Y. 57, 64 (1915) ("[s]uch a statute … is in effect a condition on which the right to do business within the state depends"). This amounts to a consent to the jurisdiction of NY courts. *See 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).

That Bayer's board was not physically present in NY when it approved the Acquisition, financings or the botched settlement is of no moment. "***It is well settled that*** '***one need not be physically present***'" in NY to be subject to jurisdiction under §302. *Fischbarg*, 9 N.Y.3d at 382. The Bayer Supervisors authorized the NY actions and the use of NY agents (lawyers/bankers) that were necessary. *See Longines-Wittnauer Watch Co. v. Barnes & Reinecke*, 15 N.Y.2d 443, 457 (1965) (even where a contract is not

executed in NY (here the Acquisition was), "the statutory test may be satisfied by a showing of other purposeful acts performed").

It is the "totality of the circumstances" that matter. *Paradigm Mktg. Consortium, Inc. v. Yale New Haven Hosp., Inc*., 124 A.D.3d 736, 737 (2d Dep't 2015); *see also AIG Fin. Prods. Corp. v. Pub. Util. Dist. No. 1*, 675 F. Supp. 2d 354, 361 (S.D.N.Y. 2009). Here, the totality of Bayer's contacts with NY are more than sufficient to establish a *prima facie* case for personal jurisdiction under §302(a)(1).

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

For the same reasons that personal jurisdiction is proper under NY law, that jurisdiction comports with ***due process***.[8] "CPLR 302 does not go as far as is constitutionally permissible." *Banco Ambrosiano, S.p.A. v. Artoc Bank & Trust, Ltd.*, 62 N.Y.2d 65, 71 (1984); *In re Bernard L. Madoff Inv. Sec. LLC*, 440 B.R. 274, 280 (Bankr. S.D.N.Y. 2010) ("As [§302] does not reach as far as the Constitution permits, due process will be satisfied if the [NY long-arm] statute is satisfied."). Specific personal jurisdiction exists where the suit arises out of or relates to the defendants' contact with the forum. *See Ford Motor Co. v. Montana Eighth Judicial Dist.*, ___ U.S. ___, 2021 U.S. LEXIS 1610, at **29–30 (U.S. Mar. 25, 2021).

[8] Due process requires that a defendant must have sufficient minimum contacts with NY such that the defendant should reasonably expect to be haled into court here, and that requiring the non-domiciliary to defend the action in NY comports with "traditional notions of fair play and substantial justice." *LaMarca v. Pak-Mor Mfg. Co*., 95 N.Y.2d 210, 216 (2000). "The 'minimum[-]contacts' test 'has come to rest on whether a defendant's conduct and connection with the forum State are such that it should reasonably anticipate being haled into court there.'" *Rushaid*, 28 N.Y.3d at 331. The inquiry is whether the defendant has "'purposefully avail[ed] itself of the privilege of conducting activities within [NY].'" *Renren*, 2020 N.Y. Misc. LEXIS 2132, at *36.

The Acquisition, its failure and the resulting damages "arise out of" or "relate to" Bayer's NY contacts. Bayer certainly had ample contacts with NY to "reasonably anticipate being hauled into court" in NY, where it has sued and been sued many times. *D&R Global*, 29 N.Y.3d at 299–300. The due-process analysis is no different when §302 jurisdiction is based on an individual's actions in a corporate capacity. *Kreutter*, 71 N.Y.2d at 470–71. Thus, due process is generally satisfied where §302 extends jurisdiction for corporate acts over a fiduciary who was a "primary actor" in the transaction. *See*, *e.g.*, *Aviles*, 380 F. Supp. 3d at 260–264.

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

The Bayer Defendants ignore the realities of modern life and their specific circumstances in complaining of burden. "'[T]he conveniences of modern communication and transportation ease' any burden the defense of this case in [NY] might impose on" Bayer. *Licci v. Lebanase Canadian Bank, SAL*, 732 F.3d 161, 174 (2d Cir. 2013). Bayer and all of its Supervisors are represented by NY counsel, WLRK—

which represented Monsanto in the Acquisition—and has now switched sides to represent Bayer. S&C is here. So is Skadden. *Law Debenture v. Maverick Tube Corp.*, 2008 U.S. Dist. LEXIS 87438, at *16 (S.D.N.Y. Oct. 15, 2008).[9] The Bayer Defendants are covered by a D&O insurance policy—purchased with shareholder dollars, which will pay their NY lawyers' fees, and will indemnify the Supervisors and Managers up to the large policy limits. ¶288. The foreign-based individuals will never have to appear here. Their depositions will be taken where they reside or remotely. Their lives of privilege will not be disturbed.

B. Plaintiffs—NY and California Residents—Are Presumptively Entitled to Sue in NY Where the Acquisition Was Negotiated, Financed and Closed, Where the Botched Settlement Was Hatched, Where the Ongoing Monsanto Litigation Morass Is Being Managed, and Where Bayer Has Sued and Been Sued Many Times and Where Bayer Frequently Made Presentations to the U.S. Investment Community

1. Neither Bayer Article 3 Nor GSCA §148 Have Any Impact on the Jurisdiction of NY Courts over, Or the Proper Venue of, This Lawsuit

The Bayer Defendants claim that according to GSCA §148 and "Bayer's corporate charter, any legal dispute ***between*** shareholders and the corporation are to be litigated in Germany." Thus, they claim that Plaintiffs must go to ***a German Court in Leverkusen to ask for permission to sue here in NY***. As Prof. Dr. Peter Mankowski

[9] Plaintiffs have carried their burden in establishing personal jurisdiction over Bayer and its Supervisors at the pleadings stage, and their motion should be denied outright. In the alternative, the motion should be denied or held in abeyance pursuant to CPLR 3211(d) so that Plaintiffs may take jurisdictional discovery. Plaintiffs have made a "sufficient start" in showing that facts "may exist" to support jurisdiction, and that their position is not "frivolous." *Peterson v. Spartan Indus., Inc.*, 33 N.Y.2d 463, 467 (1974); *Expert Sewer & Drain, LLC v. New England Mun. Equip. Co*., 106 A.D.3d 775, 776 (2d Dep't 2013).

explains, however, "Article 3(3) of Bayer AG's articles of association … has no application in this case." Mankowski ¶¶7(6), 42–45.

As discussed in ¶¶263–267, BA3 ***cannot create exclusive jurisdiction or venue in Germany***. BA3 speaks only to "***jurisdiction***," not venue or forum:

> The place of ***jurisdiction*** for all disputes ***between the Company and stockholders*** shall be the location of the Company's registered office. ***Foreign courts shall have no jurisdiction with respect to such disputes***.

Just as is the case with GSCA §148, BA3 cannot block the NY courts' subject-matter jurisdiction. *See* Standing Br. at 18–19. Unilateral action—even a contractual agreement—is equally inoperative to block NY courts' exercise of their inviolable subject-matter jurisdiction. BA3's "place of jurisdiction" and "foreign courts shall have no jurisdiction" language violate this basic NY rule. *See id*.

While parties can agree that jurisdiction ***exists*** in a foreign court, ***they may not make that jurisdiction exclusive***. That would impermissibly oust NY courts of their subject-matter jurisdiction. *Parker v. Krauss Co*., 157 Misc. 667 (1st Dep't 1935) (refusing to enforce provision intended to oust the jurisdiction of all State and Federal courts); *Sliosberg v. N.Y. Life Ins. Co*., 217 A.D. 685 (1st Dep't 1926) ("[P]arties may not thus oust the courts of this State of jurisdiction. The jurisdiction of our courts … it is not to be diminished by the ***convention of the parties***"); *Sudbury v. Ambi Verwaitung Kommanditgesselschaft*, 213 A.D. 98 (1st Dep't 1925); *MHC Greenwood Vill. NY, LLC v. U.S. Sec'y HUD*, 64 Misc. 3d 870 (Sup. Ct. Suffolk Cnty. 2019) ("contractual terms between the parties [cannot] divest the Supreme court of its general jurisdiction"); *Lischinskaya v. Carnival Corp*., 56 A.D.3d 116 (2008); *Thrasher v. U.S. Liab. Ins. Co*., 19 N.Y.2d 159 (1967); *Wm. H. Muller & Co. v. Swedish Am. Line*, 224 F.2d 806, 808 (2d Cir. 1955).

In addition to its jurisdictional invalidity, BA3's language does not even cover derivative lawsuits. BA3 applies to "***all disputes between the company and the stockholders***."[10] There is no "***dispute between***" Plaintiffs and Bayer here. This is a lawsuit on behalf of the company brought derivatively by stockholders. No relief is sought from the Company. Bayer, a nominal defendant, is the "***real***," "***true***" ***plaintiff***.[11] ¶251. The "***dispute***" ***is between stockholders of Bayer and Bayer's Supervisors/Managers, and Bayer's Banks, i.e., the Defendants***.

Agreements, or unilateral decrees that purport to establish ***jurisdiction do not establish exclusive venue or a mandatory forum***. By their own terms GSCA §148 and BA3 do not establish venue — exclusive or otherwise. Neither the words — "forum" or "venue" let alone the "magic words" "exclusive" or "sole" appear in either. ***To establish venue exclusivity the provision must unambiguously state the designated venue is exclusive***. Hannah L. Buxbaum, *The Interpretation and Effect of Permissive Forum Selection Clauses Under U.S. Law*, 66 AMERICAN JOURNAL OF COMPARATIVE LAW SUPPL. 127, 135–36 (2018) ("a typical exclusive agreement … ***uses the word*** "***exclusive***" ***or*** "***sole***" ***in order clearly to foreclose litigation elsewhere***").

[10] Like other contractual provisions, jurisdictional/venue provisions, if ambiguous, are construed against the drafter. John F. Coyle, *Interpreting Forum Selection Clauses*, 104 IOWA L. REV. 1793, 1796 (May 2019); *City of New York v. Pullman, Inc.*, 477 F. Supp. 438, 442–43 (S.D.N.Y. 1979).

[11] The entity for whose benefit the action is brought is the "true plaintiff." *See, e.g., McDermott, Will & Emery v. Super. Ct.*, 83 Cal. App. 4th 378, 382 (2000). ("Though it is named as a defendant …, the corporation is the real plaintiff[.]"); *Levin ex rel. Tyco Int'l Ltd. v. Kozlowsky*, 2006 WL 3317048, at *12 (Sup. Ct. N.Y. Cnty. Nov. 14, 2006).

Case law—federal and state—makes this clear. In *K & V Scientific Co., Inc. v. Bayerische Motoren*, 314 F.3d 494, 497 (10th Cir. 2002), a similar clause was found to be ***permissive***:

> "Jurisdiction for all and any disputes arising out of or in connection with this agreement is Munich. All and any disputes arising out of or in connection with this agreement are subject to the laws of the Federal Republic of Germany…" "[***t***]***he language of the clause at issue…contains no reference to venue, contains no language designating the courts of Munich exclusive***[.]"

The enforceability and scope of any forum/venue provision depends on ***its specific language*** "binding the parties to a particular forum." *Brooke Grp. v. JCH Syndicate 488*, 87 N.Y.2d 530, 531 (1996). ***The word*** "***shall***" ***is permissive in this context***. *Hartford Fire Ins. Co. v. Novocargo USA Inc.*, 156 F. Supp. 2d 372, 373–75 (S.D.N.Y. 2001) (clause stating "[a]ny dispute … ***shall*** be governed by German Law and determined by the courts of Bremen" … was found to be "***permissive rather than mandatory*** … ***as the use of the word*** "***shall***" ***only confers jurisdiction in the courts of Bremen, Germany without excluding jurisdiction elsewhere or employing mandatory venue language***."); *Hull 753 Corp. v. Elbe Flugzeugwerke GmbH*, 58 F. Supp. 2d 925, 926 (N.D. Ill. 1999) (same). Plaintiffs could have gone to Leverkusen and sought permission to bring this suit but elected not to. They invoked instead the subject-matter jurisdiction of BCL §§626/1319 because as U.S./NY residents they are "***presumptively entitled***" to sue in NY.

2. NY Is a Proper Venue/Forum for This Lawsuit

The *HSBC* derivative suit was filed by an ***English resident***[12] involving an ***English bank headquartered in London***, where the alleged wrongdoing involved a NY "nexus." The Court rejected that *FNC* motion. *HSBC*, 166 A.D.3d at 759. Cattan is a New Yorker; Hausmann a Californian. Defendants' arguments ignore the "***deferential presumption***" due Plaintiffs' choice of NY and the SAC's allegations of substantive NY contacts—"nexus."

Plaintiffs' choice of a NY forum can be overcome only by Defendants rebutting their "***presumptive entitlement***" to a NY venue. This requires an ***evidentiary showing*** *i.e.*, a "***heavy burden***" that the *FNC* factors "***strongly favor***" the other forum, showing that in the "***interests of justice the action should be heard***" there. *Elmaliach v. Bank of China Ltd.*, 110 A.D.3d 192, 208 (1st Dep't 2013); *Laurenzano v. Goldman*, 96 A.D.2d 852, 853 (2d Dep't 1983).

Given NY's centrality to international finance and commerce, NY courts frequently adjudicate lawsuits involving foreign laws and foreign corporations, including stockholder derivative lawsuits under BCL §§626/1319, where *FNC* motions are tested by the same rules as other cases. The ultimate application of "substantive" foreign laws to the disputes do not dictate dismissal. Defendants seeking to deny plaintiff a NY forum bear a "heavy burden," ***even if the plaintiff is not a NY resident and even if the substantive law of the alternative forum applies***. ***Their burden becomes an insurmountable one where, as here, one of the plaintiffs is a New Yorker***. *See Thor Gallery at S. DeKalb, LLC v. Reliance Mediaworks (USA) Inc.*, 131 A.D.3d 431, 432 (1st

[12] Chang Aff. ¶7 & Ex. 4 at 2 ("Plaintiff Michael Mason-Mahon is a British citizen[.]").

Dep't 2015) (plaintiff's residence ***held generally to be the most significant factor***). The deference due ***Plaintiffs***' ***selection*** of a NY forum is entitled to ***more weight when the alternative forum is thousands of miles away in Leverkusen***.

In *Broida v. Bancroft*, the Second Department upheld a NY plaintiff's choice to sue derivatively on behalf of a foreign corporation in NY:

> "The vague principle that courts will not interfere with the internal affairs of a corporation whose foreignness is at best a metaphysical concept, ***must fall before the practical necessities of the modern business world***." … ***We therefore hold that a suit which concerns the internal affairs of a foreign corporation should be entertained unless the same factors that would lead to dismissal under*** [**FNC**] ***principles suggest that*** [***NY***] ***is an inconvenient forum and that litigation in another forum would better accord with the legitimate interests of the litigants and the public***.

103 A.D.2d 88, 91–92 (2d Dep't 1984). Giving great weight to NY residents' "presumptive[] entitle[ment]" "to utilize their judicial system for dispute resolution, the Second Department emphasized that 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." *Id*.

"***This court and, in particular, this commercial part, routinely adjudicates complex commercial cases involving domestic and international parties***. ***This court is qualified by experience and expertise, to adjudicate international legal controversies involving the laws of foreign nations***." *Duncan-Watt v. Rockefeller*, 2018 N.Y. Misc. LEXIS 1383, at **12–13 (Sup. Ct. N.Y. Cnty. Apr. 13, 2018).

Defendants do not seek dismissal in favor of an alternative U.S.-based court. Here, ***dismissal*** is the ***end of the lawsuit***. The "alternative" forum is foreign where the ***pre-suit*** "***Court Procedures***" create impossible pre-discovery proof barriers and expose plaintiffs to mandatory fee-shifting. ¶¶ 284–286. Indeed, as the Second Circuit

observed in *Iragorri v. United Technologies, Corp*., defendants "may move for dismissal under the doctrine of [*FNC*] not because of genuine concern with convenience ***but because of similar forum-shopping reasons***." 274 F.3d 65, 75 (2d Cir. 2001). Courts should therefore "arm themselves with an ***appropriate degree of skepticism in assessing whether the defendant has demonstrated genuine inconvenience and a clear preferability of the foreign forum***." *Id*. In *Wiwa v. Royal Dutch Petroleum Co*., 226 F.3d 88 (2d Cir. 2000), for example, plaintiffs, ***none of whom lived in NY***, sued in NY alleging misconduct having little to do with NY. Yet, the Second Circuit held that venue in NY was proper based on the "great[] deference to the selection of a U.S. forum by U.S. resident plaintiffs." *Id*. at 102.

In *Elmaliach*, foreign citizens/residents sued a foreign bank that facilitated a terrorist attack. While the Court applied foreign law, it denied a *FNC* dismissal.

> The movant seeking dismissal has a "***heavy burden***" ***of establishing that*** [***NY***] ***is an inconvenient forum and that a substantial nexus between*** [***NY***] ***and the action is lacking***.
>
> ***
>
> "***Unless the balance is strongly in favor of the defendant***; ***the plaintiff's choice of forum should rarely be disturbed***" ***even where the plaintiff is not a resident of*** [***NY***].
>
> ***
>
> "That another forum may have a substantial interest in adjudicating an action is but one factor to be weighed" in deciding a motion to dismiss based on [*FNC*]. Although we hold that [NY]'s interest is not sufficient to require the application of [***NY***] ***law herein***, ***nonetheless*** [***NY***] ***has a sufficient interest and nexus with the claims***, ***because*** [***NY***] ***banking facilities were allegedly used*** ….

Elmaliach, 110 A.D.3d at 208–09; *see also Banco Ambrosiano*, 62 N.Y.2d at 74 (defendants' "heavy burden" on *FNC* motion not satisfied in suit by Italian Bank against Bahamian bank, with foreign law to apply).

In *Laurenzano*, 96 A.D.2d at 853, a NY resident shareholder sued derivatively for a "foreign" corporation. The *FNC* motion was denied:

> Although the [NY] residence of a shareholder in a derivative action should not be deemed conclusive to establish [NY] as an appropriate forum … ***the burden of proof is on the party seeking to invoke the doctrine of*** [**FNC**] …. ***The balance of factors*** "***must be very strongly in favor of the defendant***, ***before the plaintiff's choice of forum should be disturbed***[.]"

All U.S. residents, no matter where they live, are entitled to file derivative lawsuits for a foreign company in NY courts if jurisdiction and a NY "***nexus***" ***exists***. *Iragorri*, 274 F.3d at 73 ("It is not a correct understanding of the rule to accord deference only when the suit is brought in the plaintiff's home district."). In *Otto Candies, LLC v. Citigroup, Inc.*, plaintiffs—two U.S.-based investors, together with 37 foreigners—sued in Florida over investments in a foreign company. 963 F.3d 1331, 1335 (11th Cir. 2020), The court upheld plaintiffs' choice of forum, reasoning that "[t]he deference owed to the forum choice of domestic plaintiffs cannot be reduced solely because they chose to invest in a foreign entity and may have expected to litigate abroad." *Id*. at 1339–40.

In *Broida*, the foreign corporation sued for derivatively had ***once before*** sued in NY as a plaintiff, urging NY as an appropriate forum. 103 A.D.2d at 92–93. The court found that it "***ill behooves*** the corporation ***to now urge the contrary***." *Id.* Bayer has sued in NY several times, and its subsidiary Bayer Corporation countless times. Litigation in NY is not a novelty to the Bayer Defendants.

Litigating this "dispute" in Leverkusen, Germany would be a practical impossibility. It would deprive plaintiffs of their rights as U.S./NY citizens, to access

civil justice in the U.S./NY legal systems with its procedural rules, and right to punitive damages and a jury trial.[13]

There is no perfect forum—no one venue where everybody lives and works, and where everything related to the Acquisition took place. How could there be? ***This case involves two international corporations and two banks with worldwide operations and shareholders***. NY is clearly a permissible forum where ***both*** subject-matter jurisdiction and personal jurisdiction exist. Defendants have not carried their "***heavy burden***" of showing a ***lack of NY*** "***nexus***" ***and*** "***inconvenience and hardship***" of defending here,[14] necessary to displace the "***deferential presumption***" due to Plaintiffs' choice of NY. *FNC* is a doctrine of discretion—a weighing of all relevant factors, a center of gravity approach—where plaintiffs live, where the activities relating to the Acquisition occurred and where witnesses and documents (in the NY lawyers and bankers files) are located.[15]

C. Demand Is Futile and Thus Excused Based on Plaintiffs' Fact-Specific Allegations of Egregious Misconduct That Could Not Have Been the Result of Sound Business Judgment, as Well as Fact-Specific Allegations of the Supervisors' (1) Motive of Entrenchment; (2) the Key Wrongdoers' Control over Them; and (3) the Premature Proclamations of Their Own Innocence

Defendants ultimately ***acknowledge NY law controls*** the "gatekeeper" rules for this suit by seeking refuge in NY's demand futility rule §626(c). But, NY law provides no escape. Under NY law, demand is futile when a ***majority*** of directors are ***incapable of***

[13] *Fedoryszyn v. Weiss*, 62 Misc. 2d 889 (Sup. Ct. Nassau Cnty. 1970).

[14] The Bayer Defendants have not submitted any declarations detailing what inconvenience or hardship defending the case in NY would cause them.

[15] The Bayer Directors/Officers are insured via a D&O policy purchased with shareholder monies to protect Bayer from their malfeasance. They are represented here by some of the finest lawyers in the world—lawyers familiar with the underlying events because they represented Monsanto. They will suffer no serious inconvenience from defending the case in NY. ¶228.

making an impartial decision as to whether to bring suit. *Bansbach v. Zinn*, 1 N.Y.3d 1 (2003). A plaintiff may satisfy this standard by alleging that: (1) the directors are ***"interested*** in the challenged transaction," (2) they "did not fully inform themselves about the challenged transaction to the extent reasonably appropriate under the circumstances," or (3) "the challenged transaction was so egregious on its face that it could not have been the product of sound business judgment." *Marx v. Akers*, 88 N.Y.2d 189, 200–01 (1996). While Plaintiffs need only meet one futility prong, their SAC satisfies ***all three***.

The SAC pleads the Supervisors (1) are all "***interested***" because they pursued the Acquisition to entrench and benefit themselves and are "controlled" by primary wrongdoers Wenning and Baumann, allowing all of them to personally benefit from the Acquisition; (2) did not do the due diligence necessary to adequately inform themselves concerning the Acquisition and thus breached their duties of care; and (3) the Acquisition was part of a ***pattern*** of negligent due diligence regarding cross-border acquisitions of U.S. entities—with epic due diligence failures amid conflicts of interest in this case—conduct ***so egregious it could not have been the product of sound business judgment***. *Marx*, 88 N.Y.2d at 200–01; *Barr v. Wackman*, 36 N.Y.2d 371, 381 (1975).

1. Particularized Factual Allegations Demonstrate That the Underlying Egregious Misconduct Could Not Have Been the Product of Good Faith Business Judgment

Like *HSBC*, this lawsuit does not involve a single "transaction" where independent professionals provided protective fairness opinions. No fairness or other protective opinion was issued. *HSBC* stressed the duration and seriousness of the wrongdoing that board permitted and the "***payment in excess of $1.5 billion in fines and penalties to authorities"*** to dispose of the demand futility argument there. *See* 166

A.D.3d at 758–59. Here, ***the SAC alleges an even worse pattern of oversight failures by the Supervisors—three consecutive failed acquisitions of U.S. companies over 3–4 years, where inadequate due diligence damaged Bayer***. ***Three strikes and you are out***.

HSBC also found demand futility because plaintiff's allegations of ***board knowledge*** were based upon a company policy requiring compliance violations by ***underlings be reported to the board***. *See* 166 A.D.3d at 758. ***Here the Supervisors' knowledge is not an issue because the misconduct was the Supervisors' misconduct***. ¶¶286–328. It was their decision to make the "Worst Acquisition in History"—the "***terrible bet***." ¶241. Then they authorized the botched settlement. ¶¶12–20. They were the "***primary actors***," and they were acting ***to entrench and personally benefit themselves***. ¶303.

2. Particularized Factual Allegations Demonstrate That the Supervisors Were Personally Interested in the Transaction and Benefited from Entrenching Themselves

"Directors may not act out of a sole or primary motive of entrenchment to perpetuate themselves in office." *Unocal Corp. v. Mesa Petroleum Co*., 493 A.2d 946 (Del. 1985). In fact, directors are "presumptively 'interested' in … actions taken for entrenchment purposes." *Cal. Pub. Emps.' Ret. Sys. v. Coulter*, 2002 Del. Ch. LEXIS 144, at *25 (Del. Ch. Dec. 18, 2002) (citing *Carmody v. Toll Bros., Inc.*, 723 A.2d 1180, 1189 (Del. Ch. 1998) (particularized allegations that directors "acted for entrenchment purposes [are] sufficient to excuse … demand")).

The Supervisors structured the Acquisition as ***all-cash***, to raise Bayer's debt level so high that it operated as a "***poison pill***" making Bayer "***unacquirable***" avoiding a takeover by Pfizer, which would have resulted in them losing their positions of power, prestige, and profit—something they wanted to avoid. ¶¶301–303. The Acquisition

served the ***personal*** interests of the insiders at the expense of Bayer and its shareholders, thus excusing demand.

3. Demand Is Excused Because of the Supervisors' Premature Absolution of Their Alleged Misconduct

The Supervisors have already rejected any challenge to what they did. Their biased minds cannot objectively evaluate their own misconduct. ¶308.

In April 2019, Bayer's shareholders voted 55% "no confidence" in the Managers/Supervisors—***the first ever such a vote at a German company***. Shareholders complained, "***Nobody else wanted to touch Monsanto***"; "***Bayer bought the black sheep of the industry and clearly underestimated the litigation and reputational risks***." "One has to ask critically if the due diligence was faulty." "To be gambling away the trust of so many investors within such a short time has historic proportions." "***He miscalculated the reputational risk of the takeover, and the legacy issues will stick with the company for years to come***." ¶31.

The Supervisors rejected the vote and criticisms. They ***pronounced Wenning, Baumann, Condon and themselves blameless***. According to the *Financial Times*, "***the Board showed its contempt for the owners with a statement that it 'unanimously stands' behind management***." ¶307.

Baumann crowed "[t]he Management Board enjoys the full confidence of the Supervisory Board." Baumann and Condon continue to insist that "the Monsanto acquisition ***was and is a good idea***," and they would acquire Monsanto "***at any time without any ifs, ands or buts***." "***All reputational issues and risks were actually identified and assessed***." They have "***no regrets***." All accusations against them "***were baseless … we went through everything that was available in the due***[-]***diligence***

process … ***and we reviewed it afterwards***. ***Today looking back we would still have come to the same conclusion***." The Supervisors "***performed*** [***the***] ***risk assessment which was in all respects adequate***." ¶306.

These people cannot "objectively weigh" whether Bayer should bring these claims directly, *i.e.*, sue the Bayer Defendants and the Banks. ¶¶133, 308.

III. CONCLUSION

For the foregoing reasons, the Court should deny the motions to dismiss the verified SAC based on lack of personal jurisdiction, *FNC*, and failure to make pre-suit demand.

Dated: New York, New York
April 13, 2021

Respectfully submitted,

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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 6,970 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.

End of Document

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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