To Be Argued By:
Francis A. Bottini, Jr.
Time Requested: 30 Minutes

APL-2024-00016

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Appellate Division, First Department Case No. 2022-04657

Court of Appeals

STATE OF NEW YORK

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)

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Defendants-Respondents,

and

BARCLAYS PLC,

Nominal Defendant-Respondent.

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PRELIMINARY STATEMENT

To modernize the BCL,[1] the Legislature enacted §1319, mandating that New York's gatekeeping rules governing shareholder derivative actions (*i.e.*, §626 and §627) apply to foreign corporations—so long as they do business in New York.[2] This statutory regime codified two long-standing common-law rules. First, it codified the subject-matter jurisdiction over derivative actions that New York courts have been exercising since the 1800s.[3] Second, it codified the right of *beneficial* shareholders to bring derivative actions for the protection of American investors who overwhelmingly own stock in "street name."[4] Through these rules, the Legislature ensured that shareholders of foreign corporations doing business in New York have access to New York courts to bring derivative actions—regardless of whether they are beneficial shareholders or record shareholders, and regardless of whether the laws of the incorporating foreign jurisdictions require derivative plaintiffs be record shareholders.

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[1] This reply adopts all terms defined in the May 21, 2024 Brief for Plaintiff-Appellant ("Appellant's Br."). Unless otherwise noted, all emphases in quoted texts are added.

[2] *See* Robert A. Kessler, *The New York Business Corporation Law*, ST. JOHN'S L. REV., Vol. 36, No. 1, Art. 1, at 3 (Dec. 1961) (the BCL was "designed to … moderniz[e] … present law").

[3] *See Robinson v. Smith*, 3 Paige Ch. 222, 231–32 (N.Y. Ch. 1832) ("this court ha[s] jurisdiction, so far as the individual rights of the corporators were concerned, 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").

[4] Kessler, *The New York Business Corporation Law*, at 108 (identifying "protection to the shareholders" as a legislative purpose).

Invoking this statutory regime,[5] Plaintiff—a New York resident who owns 2,500 shares of Barclays stock—brought this derivative action in the Supreme Court in Manhattan. Several subway stops north, Barclays maintains a skyscraper—its U.S. headquarters—and operates a multi-billion-dollar enterprise for its "second home [U.S.] market."[6] American investors, including New York's public pension funds,[7] own millions of shares of Barclays stock, which is listed on the NYSE.[8] This action's ties to New York and New York's interest in exercising jurisdiction over it are overwhelming because Barclays' vast New York presence and activities are inextricably intertwined with the alleged wrongdoing.[9] Thus, jurisdiction in New York is indisputably proper. Indeed, this complex shareholder derivative action belongs to the Commercial Division, whose able judges "dispassionately administer[] a known, stable, and commercially sophisticated body of law."[10]

Yet, Defendants dispute jurisdiction. Arguing that the BCL is inapplicable due to the common-law internal-affairs doctrine, they convinced the lower courts to apply English procedural law—*i.e.*, ECA §§260–264's antiquated requirement of a

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[5] R774 (¶86) ("[the claims here are] asserted in New York State Court via New York's procedural rules").

[6] R750 (¶31) ("[Barclays] identifies itself as 'a transatlantic consumer and wholesale bank, *anchored in its' two home markets of the UK and US*'") (emphases in original).

[7] *See, infra,* at 19–20 & n.32.

[8] R750 (¶31).

[9] Appellant's Br. at 28–31.

[10] *Ehrlich-Bober & Co. v. Univ. of Houston*, 49 N.Y.2d 574, 581 (1980).

"member" with registered shares to sue—under which beneficial shareholders (*i.e.*, most American investors) would lack standing to bring derivative claims. Defendants' position in this appeal—nearly identical to that in the companion *Bayer* appeal[11]—crystallizes the central question before this Court:

> *Can a New York-resident owner of thousands of shares in a foreign corporation doing business in New York pursue a derivative action in a New York court and invoke the procedures of New York's gatekeeping rules?*

The Court should answer yes. The Legislature has indeed mandated so by enacting §1319 and §626. And that answer is faithful to the presumptive applicability, as recently affirmed in *Eccles*,[12] of the internal-affairs doctrine on *substantive* issues.[13]

The BCL is part of a comprehensive legislative regime intended to maintain New York's centrality to global commerce and to regulate foreign corporations doing business here.[14] Designed as "[t]he conditions precedent for bringing …

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[11] The *Bayer* appeal, Case No. APL-2024-00016, raises additional issues relating to personal jurisdiction (CPLR §302) and *forum non conveniens* (CPLR 327). Plaintiffs-appellants in the *Bayer* appeal adopt the positions of Plaintiff in this *Barclays* appeal on the issues relating to §1319, the internal-affairs doctrine, and the application of New York's gatekeeping rules governing shareholder derivative actions in New York courts.

[12] *Eccles v. Shamrock Capital Advisors, LLC*, ___ N.E.3d ___, 2024 N.Y. LEXIS 690 (N.Y. May 23, 2024).

[13] In fact, consistent with *Eccles*, Plaintiff pleads that the ECA's substantive provisions govern the liability issues in this case. R776–778 (¶91).

[14] *Id.* at 107 n.418 (the BCL "[s]ubject[s] foreign corporations to the same standards as [New York] corporations … in a number of areas," including §1319's mandate).

shareholder[] derivative actions," §§626–627 reflect the balance between shareholder rights and access to courts on the one hand, and management independence and business-judgment protection on the other hand.[15] While §626 secures the beneficial shareholders' right to sue, §627 provides "security for costs" to protect corporations against "strike suits." Additional procedural guardrails, such as CPLR 3211–3212 (motions to dismiss and for summary judgment) and 22 NYCRR §130-1.1 (sanctions), are available to ensure efficient resolution of shareholder derivative actions and to curb frivolous or vexatious litigation. As this Court noted in *Davis*, New York's "own 'gatekeeping' statutes" can "effectively weed out … insufficient or meritless claims."[16]

Under *Davis*, New York law—not English law—applies to the "gatekeeping" issues. England's requirement of a "member" with registered shares is found in the ECA's procedural provisions, §§260–264, "Application for Permission to Continue Derivative Claim," which apply only to actions brought in England. On this issue of "derivative standing," New York's own gatekeeping rule, BCL §626, applies.[17] *Davis* also mandates applying New York law here.

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[15] *Id*. at 36, 86.

[16] *Davis v. Scottish Re Group Ltd.*, 30 N.Y.3d 247, 257 (2017).

[17] *See also Hfg Co. v. Pioneer Publ'g Co*., 162 F.2d 536, 540 (7th Cir. 1947) (refusing to apply Illinois's statutory requirement for record shareholders because "the equitable and beneficial owner of stock in the defendant corporation … was a sufficient allegation that it was a 'shareholder' as contemplated by the [Federal Rules of Civil Procedure]").

* * *

Davis and *Eccles* function in harmony with BCL §1319 to implement three overarching policies of New York. First, in exercise of its power to regulate commerce, certain aspects of the BCL apply to foreign corporations doing business here. In fact, this Court has led the implementation of this policy since the 1900s.[18]

Second, the right of beneficial shareholders to bring derivative actions must be protected. So must New York-resident shareholders' access to New York courts. Over the years, defendants in shareholder derivative actions have argued for applications of the laws from various countries, including "corporate havens" such as the Cayman Islands,[19] where the procedural bar to derivative actions is so high as to make them impractical to prosecute. Here, to apply England's antiquated "membership" requirement for derivative standing would effectively nullify beneficial shareholders' right to sue granted by the Legislature in §626.

Third, New York has a strong interest in regulating foreign corporations doing business here. To that end, New York courts have steadfastly exercised jurisdiction over foreign corporations doing business here—a tradition this Court has maintained for over a hundred years following the intellectual leadership of Judge Cardozo.[20]

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[18] *German-American Coffee Co. v. Diehl*, 216 N.Y. 57, 65 (1915) (Cardozo, J.) (applying New York law on corporate dividends to a case involving a New Jersey corporation).

[19] *See*, *infra*, at 21 n.36.

[20] *See Bagdon v. Phila. & Reading Coal & Iron Co*., 217 N.Y. 432, 439 (1916) (Cardozo, J.) (exercising jurisdiction over a foreign corporation); *see also* Appellant's Br. at 3.

But the lower courts' decisions in this case and in *Bayer* are at odds with these policies. Instead of regulating foreign corporations that operate multi-billion-dollar businesses out of New York, the lower courts let them flee to their home courts, insisting that New York shareholders follow foreign procedural rules and petition foreign courts for permission to prosecute the derivative claims. Instead of protecting the New York-residents' right to bring derivative claims, the lower courts shut the courthouse doors. And instead of fostering New York's status as this Nation's window on the world, the lower courts ceded jurisdiction to foreign courts. The lower courts' decisions in *Barclays* and *Bayer* reflect their hostility towards shareholder derivative litigation. This Court must bring them back in line.

The *Barclays* and *Bayer* cases present this Court with the opportunity to clarify BCL §1319 and remove the cloud over the "derivative standing" of New York shareholders to bring derivative actions in New York courts. The Court should reverse the lower courts in both cases. Reversal is required by statutory command. Reversal is also necessary to reinforce New York's centrality in global commerce and preeminence in corporate finance, with a modern, fair, and efficient legal system indispensable to carrying out the sound policies of New York.[21]

[21] *Ehrlich-Bober*, 49 N.Y.2d at 581.

ARGUMENT

In refusing to apply New York's gatekeeping rules to this shareholder derivative action, the First Department committed two legal errors: (1) it disregarded BCL §1319's mandate to apply §626 to foreign corporations doing business in New York; and (2) it failed to follow precedents directing the application of §626 to this action. Both errors require reversal.

I. This Court Should Enforce §1319's Statutory Mandate and Effectuate the Legislature's Intent to Modernize the BCL for the Protection of American Investors and for the Preservation of New York Courts' Jurisdiction over Derivative Actions Involving Foreign Corporations Doing Business in New York

For two centuries, New York courts have exercised jurisdiction over shareholder derivative actions. *Robinson*, 3 Paige Ch. at 231–32; *see also Attorney-General v. Utica Ins. Co*., 2 Johns. Ch. 371, 389 (N.Y. Ch. 1817).[22] Codifying this common-law authority in 1961, the Legislature enacted BCL §626 conferring jurisdiction to New York courts over actions brought on behalf of "domestic *or foreign* corporation[s]." N.Y. BUS. CORP. LAW §626(a). To protect shareholders in the modern-day international corporate world,[23] the Legislature provided standing to sue to all "holder[s] of shares … of the corporation or of a *beneficial interest* in

[22] New York courts' exercise of "equity jurisdiction" over shareholder derivative actions predated their federal counterparts by decades. *See Dodge v. Woolsey*, 59 U.S. 331, 347 (1856).

[23] Kessler, *The New York Business Corporation Law*, at 107–08 & n.418 (balancing "protection to the shareholders" against "avoid[ing] discouraging foreign corporations from doing business in New York").

such shares." *Id*. This statutory grant of the right to bring derivative claims to "beneficial"—as opposed to "record"—shareholders was part of the modernization of the BCL because, as the record here demonstrates (R1053–1093), U.S.-based investors are typically beneficial owners who own stock in "street name." 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).[24]

The Legislature also enacted §1319 as part of the statutory regime to regulate certain aspects of the "internal affairs" of foreign corporations doing business in New York. *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) ("*Joint Report*") (Addendum A). Specific and unambiguous, §1319's text mandates that §626—including the beneficial shareholders' right to bring derivative claims—"*shall* apply to a foreign corporation doing business in this state, its directors, officers and shareholders." N.Y. BUS. CORP. LAW §1319(a)(2).

This Court has long implemented the Legislature's scheme to regulate foreign

[24] *See also* David C. Donald, *The Rise and Effects of the Indirect Holding System: How Corporate America Ceded Its Shareholders to Intermediaries*, INSTITUTE FOR LAW AND FINANCE WORKING PAPER SERIES NO. 68, at 24 (Sept. 26, 2007) ("it is likely that a listed company will have only one registered shareholder, appropriately named 'Cede & Company,' the nominee of the Depository Trust Company (DTC), *which … clears and settles almost all securities transactions … on organized markets in the United States*").

corporations, reasoning that, by choosing to do business in New York, they have consented to the application of New York's laws. *German-American Coffee Co. v. Diehl*, 216 N.Y. 57, 64 (1915). Following *German-American Coffee* and §1319, the First Department in *Culligan Soft Water Co. v. Clayton Dubilier & Rice LLC* held that "*the issue of plaintiffs*' *standing to bring a shareholder derivative action is governed by New York law*"—not the law of the place of incorporation. 118 A.D.3d 422, 423 (1st Dep't 2014). In so holding, the First Department reasoned that §1319 displaced the internal-affairs doctrine, which would otherwise make applicable the law of the corporation's place of incorporation. *Id*.

In contravention of *Culligan*'s holding and §1319's text, however, the First Department invoked the internal-affairs doctrine and applied English law on the issue of Plaintiff's standing to bring derivative claims. This is error for three reasons.

A. Reversal Is Necessary Because the First Department Disregarded BCL §1319's Mandate to Apply §626 to Shareholder Derivative Actions Brought on Behalf of Foreign Corporations Doing Business in New York

Courts are duty-bound "to effectuate the intent of the Legislature," and "the clearest indicator of legislative intent is the statutory text." *Majewski v. Broadalbin-Perth Cent. Sch. Dist.*, 91 N.Y.2d 577, 583 (1998). Here, §1319's text leaves no room for debate: §626—New York's gatekeeping rules specifically governing shareholder derivative actions—"*shall apply to a foreign corporation* doing business in this state, its directors, officers and shareholders." N.Y. BUS. CORP. LAW

§1319(a)(2). Where, as here, legislative intent is clear from statutory text, courts need not resort to legislative history and must apply the statute according to its plain text. *Deutsche Bank Nat'l Trust Co. v. Lubonty*, 208 A.D.3d 142, 147 (2d Dep't 2022).

But legislative history further demonstrates the intent of the Legislature to apply §626's gatekeeping rules to shareholder derivative actions involving foreign corporations doing business in New York. In a report submitted to the Legislature in January 1961, the corporate establishment criticized the Foreign Corporation Statutes, including §§1317 and 1319, because they were designed "to regulate the internal affairs of foreign corporations." Bill Jacket, L 1961, ch. 855, *Joint Report*, at 32–35. Before the passage of Article 13, the corporate establishment "strongly urged" the Legislature "that foreign corporations should be subject to and regulated by the law of the jurisdiction of incorporation, not by the law of New York." Robert S. Stevens, *New York Business Corporation Law of 1961*, CORNELL L. REV., Vol. 47, Issue 2, 141, at 172 (Winter 1962). Despite the corporate establishment's strong opposition, the Legislature enacted §1319 to impose §626—New York's "conditions precedent for bringing a shareholder[] derivative action"—on foreign corporations doing business here. Kessler, *The New York Business Corporation Law*, at 85.

1. Defendants' Challenges to the Validity of Legislative History Are Meritless

Unable to quarrel with §1319's text and legislative history, Defendants resort to two red herrings. First, they say that the *Joint Report* was not legislative history because "the cover letter submitting the [report] to the governor's office … made clear that this 'opposition' was later withdrawn." Respondents' Br. at 22. But whether or not the corporate establishment's report was withdrawn is immaterial. What matters is that the report was submitted to the Legislature at the time of Article 13's passage, and that the Legislature was aware of—and decided to overrule—the corporate establishment's objections to §1319 on the basis that the new law would impose New York's gatekeeping rules governing shareholder derivative actions on foreign corporations doing business here. *See Woollcott v. Shubert*, 217 N.Y. 212, 221 (1916) (legislative history includes "contemporaneous events").

More importantly, contrary to Defendants' argument, the corporate establishment never withdrew its opposition to §1319's grant of a beneficial shareholder's right to bring derivative actions involving foreign corporations doing business in New York. At a public hearing held on January 31, 1961 before the Joint Legislative Committee at the Capitol in Albany, the chairman of the New York County Lawyers' Association Committee on Corporation Laws criticized the proposed §1319 as "an unwarranted assertion of authority by New York State over the internal affairs of foreign corporations." Bill Jacket, L 1961, ch. 855, *Minutes*

of the Proceedings of a Public Hearing of the Joint Legislative Committee to Study Revision of Corporation Laws, at 64 (Jan. 31, 1961) (Addendum B). In opposing the enactment of §1319, the chairman referenced the "report of the New York State Bar and the New York City Bar Committees":

> [W]e do unanimously oppose the present bill. … We have also considered *the report of the New York State Bar and the New York City Bar Committees* and, in general, add our support to their views.

Id. at 65. These statements were "included in the record." *Id*. at 71. Defendants lack a basis to challenge the validity of this legislative history.

2. As Evident in Both Statutory Text and Legislative Purpose, §1319 Is a Choice-of-Law Provision

Defendants assert that §1319 is not a choice-of-law provision. But the title of §1319—"[*a*]*pplicability* of other [BCL] provisions"—indicates that the provision aims to direct the *application*—the *choice*—of New York law. The phrase "shall apply" in §1319(a) manifests the Legislature's intent to impose certain BCL provisions, including §§626–627, "to a foreign corporation doing business in this state." N.Y. BUS. CORP. LAW §1319(a). By definition, "choice of law" means "determining *the applicable law to apply*." BLACK'S LAW DICTIONARY, at 241 (6th ed. 1990). This is exactly what the Restatement (cited by Defendants) says: "*Statutes that are expressly directed to choice of law … provide for the application of the local law of one state*, rather than the local law of another state." RESTATEMENT (SECOND) OF CONFLICT OF LAWS, §6 cmt. a (1971). Where, as here, the text of the

statute is clear and unambiguous, courts must follow the statutory directive. *Majewski*, 91 N.Y.2d at 583. In fact, this First Department in *Culligan* did exactly that—construing §1319 to mandate that "New York law appl[y]" to derivative claims brought on behalf of a foreign corporation. 118 A.D.3d at 423.

Defendants' erroneous assertion originates from *Lewis v. Dicker*, where the trial court concluded—as a "matter of first impression," *but without analysis*—that §1319 "is not a conflict of laws rule, and does not compel the application of New York law." 118 Misc. 2d 28, 30 (Sup. Ct. Kings Cnty. 1982). *Lewis*'s unsupported conclusion found its way to four trial-court decisions that contained no independent analysis on this point.[25] These decisions were in turn reported in commentaries. But an erroneous conclusion—reached *without analysis*—remains erroneous, regardless of how many times it gets repeated. *Lewis*'s erroneous conclusion that §1319 is not a choice-of-law provision conflicts with the very definition of "choice of law" and *Culligan*.[26] This Court must reject it.

Undeterred, Defendants insist on peddling *Lewis*'s erroneous construction of

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[25] *City of Aventura Police Officers' Ret. Fund v. Arison*, 70 Misc. 3d 234 (Sup. Ct. N.Y. Cnty. 2020); *Stephen Blau MD Money Purchase Pension Plan Trust v. Dimon*, 2015 N.Y. Slip Op. 32909(U) (Sup. Ct. N.Y. Cnty. May 6, 2015); *David Shaev Profit Sharing Plan v. Bank of Am. Corp.*, 2014 N.Y. Slip Op. 33986(U) (Sup. Ct. N.Y. Cnty. Dec. 29, 2014); *Potter v. Arrington*, 11 Misc. 3d 962 (Sup. Ct. Monroe Cnty. 2006).

[26] Likewise inapposite is *City of Philadelphia Board of Pensions & Retirement v. Winters*, 2022 N.Y. Slip Op. 34589(U) (Sup. Ct. Nassau Cnty. Feb. 2, 2022). That decision did not address whether §1319 displaces the internal-affairs doctrine with respect to New York's gatekeeper rules governing derivative actions.

§1319 as "a jurisdictional provision." Respondents' Br. at 18 (citing *Arison*, 70 Misc. 3d at 244). But §626 *is* the "jurisdiction provision" in this statutory regime—conferring jurisdiction on New York courts over "action[s] … in the right of a domestic or foreign corporation to procure a judgment in its favor." N.Y. BUS. CORP. LAW §626(a). Defendants' construction of §1319 as a duplicative "jurisdiction provision" would render §1319 redundant and would thus violate the canon that prohibits construing a statute to "render[] one part meaningless." *Anonymous v. Molik*, 32 N.Y.3d 30, 37 (2018). On this point, the Court should reject Defendants' attempt to justify their erroneous construction by latching onto §1319's function of limiting §626's application to foreign corporations doing business in New York. Apparent in §1319's text, that function does not support a reading of §1319 as jurisdiction-conferring in the first place. There is no basis—textual or otherwise—to construe §1319 as conferring jurisdiction. Where, as here, the statutory text is clear, §626 "shall apply." N.Y. BUS. CORP. LAW §1319(a).

3. Legal Scholars Unanimously Construe §1319 as a Mandate to Apply New York Law in Derivative Actions Brought in New York Involving Foreign Corporations

The imposition of §626's gatekeeping rules on foreign corporations reflects the New York Legislature's judgment in balancing "the interests of shareholders, management, employees, and the overriding public interest." Stevens, *New York Business Corporation Law of 1961*, at 172. The Legislature decided to confer

standing to bring derivative actions to all "holder[s] of shares … or of a beneficial interest in such shares"—regardless of whether such holders have standing to bring derivative actions under foreign law. N.Y. BUS. CORP. LAW §626(a). As Professors DeMott and Kessler observed, this is part of the statutory regime to regulate certain aspects of the "internal affairs" of foreign corporations doing business in New York. Deborah A. DeMott, *Perspectives on Choice of Law for Corporate Internal Affairs*, 48 LAW & CONTEMPORARY PROBLEMS 161, at 164 (1985); *see also* Kessler, *The New York Business Corporation Law*, at 107 n.418.

Defendants attempt to muddy these scholarly observations. *See* Respondents' Br. at 23–24. Contrary to Defendants' argument, Professor DeMott cited §1319 as a basis to apply New York's "special requirements on derivative litigation" to "specified internal affairs questions in certain foreign corporations." DeMott, *Perspectives on Choice of Law for Corporate Internal Affairs*, at 164 & ns.22–24. Likewise, Professor Kessler referenced BCL "§§1318–20" as one of the "areas" in which the Legislature intended to "subject[] foreign corporations to the same standards as local corporations." Kessler, *The New York Business Corporation Law*, at 107 n.418. The Court should therefore endorse the unanimous view of these scholars that, by enacting §1319, the Legislature intended to apply *certain parts of New York law, including §626*, to foreign corporations doing business here.

B. Reversal Is Consistent with *Eccles*'s Construction of the Common-Law Internal-Affairs Doctrine

Defendants' arguments against reversal here hinge on their string citation to cases applying the internal-affairs doctrine to *substantive* issues in shareholder derivative actions involving foreign corporations. But all of the decisions cited by Defendants, including this Court's recent decision in *Eccles* and the First Department's decisions in *Hart* and *Lerner*,[27] applied the internal-affairs doctrine—*outside the context of BCL §1319*—where no statutory directives mandated the application of New York law.

Defendants mischaracterize Plaintiff's position as "ask[ing] this Court to overturn more than 60 years of its precedent holding that the internal affairs doctrine applies to shareholder derivative actions brought on behalf of foreign corporations." Respondents' Br. at 1. Plaintiff asks for no such thing. Simple and straightforward, Plaintiff's "ask" is an elementary application of the rule that a statutory directive trumps a common-law doctrine. RESTATEMENT (SECOND) OF CONFLICT OF LAWS, §6(1), Cmt. b (1988) ("the court will apply a local statute in the manner intended by the legislature" and "follow a statutory directive of its own state on choice-of-law"). This rule has been on the books in New York for over a century. *See, e.g.*, *Meeker v. Wright*, 76 N.Y. 262, 267 (1879) ("[t]he statute and the rule of the common law

[27] *Hart v. Gen. Motors Corp.*, 129 A.D.2d 179 (1st Dep't 1987); *Lerner v. Prince*, 119 A.D.3d 122 (1st Dep't 2014).

cannot stand together, and the latter must give way"); *Fairchild v. Gwynne*, 16 Abb. Pr. 23, 30 (Sup. Ct. N.Y., Gen. Term, 1st Dist. 1863) (same); *accord Gen. Motors Corp. v. Devex Corp*., 461 U.S. 648, 651–53 (1983) (holding that a statute overrode a longstanding common-law doctrine).

Rather than deviating from *Eccles*, as Defendants suggest, Plaintiff's position in this appeal is completely in line with *Eccles*. There, this Court upheld the presumptive applicability of the internal-affairs doctrine to substantive issues in shareholder derivative actions involving foreign corporations. *Eccles*, 2024 N.Y. LEXIS 690, at *1. This was the rule Plaintiff invoked when it brought this derivative action: as alleged in the FAC, "[t]he substantive claims made are based on English law." R774 (¶86). In fact, Plaintiff pleaded all applicable provisions of the ECA governing Defendants' liability in this action. R776–778 (¶91).[28]

Clear and unequivocal, Plaintiff's consent to the applicability of English law on substantive issues fits within *Eccles*'s framework.

[28] Contrary to Defendants' argument, Plaintiff's position to apply New York's gatekeeping rules—as mandated by §1319—does not "dramatically complicate corporate planning." Respondents' Br. at 33. In light of Barclays' jurisdictional ties to New York (*see, e.g.*, R892–897 (¶¶297–311); R937; R985; R1028; R1033), there is no basis for Defendants to argue that subjecting Barclays to derivative actions under New York's gatekeeping rules would undermine the interests of consistency and predictability. Indeed, applying New York law here is consistent with the "consent regime" articulated by Judge Cardozo in *German-American Coffee* and *Bagdon*. Appellant's Br. at 3–4, 10, 26–28 & n.16.

C. Reversal Is Required to Implement the Legislative Intent to Ensure American Investors' Access to New York Courts and to Preserve New York's Status as the Center of World Commerce and Finance

Equally clear and unequivocal is Plaintiff's invocation of New York's own gatekeeping rules applicable to all derivative actions brought in New York courts—regardless of whether the underlying company is domestic or foreign:

> The procedural provisions of the [ECA], "***Section 261*—*Application to Continue Derivative Claim***"—are not applicable to this lawsuit in New York State court, where New York's pre-suit … procedure, N.Y. BUS CORP. LAW §§ 626, 1319, controls. Section 626 applies to all derivative shareholder lawsuits filed in New York on behalf of any "***domestic or foreign corporation***."

R864 (¶245) (emphases in original); *see also* R774 (¶86); R778 (¶92). The applicability of §1319 here is consistent with the Legislative intent to regulate foreign corporations doing business in New York—for the protection of American investors' access to New York courts. *See* Kessler, *The New York Business Corporation Law*, at 108 (noting "protection to the shareholders").

As "the first major revision of New York law relating to business corporations in over thirty years," the Legislature passed the BCL at the 1961 session. Stevens, *New York Business Corporation Law of 1961*, at 141. As Dean Stevens (*id.*) and Professor Kessler noted, the 1961 revisions were "designed to … moderniz[e] … present law." Kessler, *The New York Business Corporation Law*, at 3. This modernization was needed to meet the demands of the rapid growth of the post-

World War II securities markets in New York, where the NYSE "recovered its vitality" and "broadened stock ownership [to American investors] considerably." *The History of NYSE*, INTERNATIONAL EXCHANGE, INC., at 4 (2024).[29] In the 1900s, the yearly trading volume at the NYSE was barely in the hundred-million-share range. *See The History of NYSE*, at 2 ("on December 15, 1886, [daily] trading volume topped 1 million shares for the first time"). With "automation systems installed … during the 1950s," trading volume at the NYSE increased "from just over a billion shares traded during 1960 to over three billion in 1970." *Id*. at 4.[30] The growth of trading volumes was also attributed to the ever-increasing number of overseas corporations listing on the NYSE.[31]

The impact of the BCL's modernization is far-reaching because the growth of the securities markets in New York brought about the growth of the number of American investors and the size of their investments in foreign companies. Many of these investors, like Plaintiff here, reside in New York. For example, New York's

[29] *Available at* https://www.nyse.com/history-of-nyse (last visited Sept. 19, 2024).

[30] Today, 700 million shares are traded daily on the NYSE—a volume made possible by technology and the use of intermediaries (*i.e*., Cede & Co.).

[31] Today, "[o]ver 530 of the world's largest and most influential international companies are listed on the NYSE, spanning across 45 countries." *International Listings*, INTERNATIONAL EXCHANGE, INC., at 1 (2024), *available at* https://www.nyse.com/listings/international-listings (last visited Sept. 19, 2024). These foreign countries include corporate havens like Bermuda (37 companies) and are located in every corner of the world from Kazakhstan to Zambia.

public employee pension funds hold millions of shares of Barclays stock.[32] Here, as alleged in the verified FAC, Plaintiff owns 2,500 "registered" shares of Barclays stock. R750 (¶30).[33]

The growth of the markets in New York and stock ownership among American investors necessitated the change in the form of ownership: from shareholders of record to shareholders in "street name." *Cross-Border Issues of Securities Law*, at 20 (R1074). Instead of having their names inked onto a share register or a stock certificate,[34] U.S.-based shareholders have become dependent on the beneficial-ownership systems—being beneficial shareholders with an intermediary as the "record shareholder."[35]

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[32] As of 2021–22, the New York State Common Retirement Fund held 16.6 million shares of Barclays stock. *See* OFFICE OF THE NEW YORK STATE COMPTROLLER, *New York State Common Retirement Fund Asset Listing as of March 31, 2021*, at 9, *available at* https://www.osc.state.ny.us/files/retirement/resources/pdf/asset-listing-2021.pdf (last visited Sept. 19, 2024).

[33] Paragraph 30 of the verified FAC states that that Plaintiff is "a 'member of the company' under the [ECA]" because Plaintiff's "shares are registered with Barclays." This verified statement carries the weight of evidence. *See* CPLR §105(u); *see also Fortino v. Hersch*, 307 A.D.2d 899, 899 (1st Dep't 2003). In the First Department, Plaintiff sought reversal based on the trial court's failure to accept as true, and give weight to, this verified statement. R1614–1615. The First Department rejected Plaintiff's argument without discussion.

[34] The oldest stock certificate—inked by a quill pen—was issued in 1606 by the Dutch East India Company. *Oldest Share Certificate*, GUINESS WORLD RECORDS LTD. (2024).

[35] Today, the main intermediary is Cede & Co., which "is a specialist United States financial institution that processes transfers of stock certificates … [for] the [NYSE] and Nasdaq." *Cede and Company*, WIKIPEDIA (2024). "Cede" is a shorthand for "certificate depository." *See generally* William T. Dentzer, Jr., *The Depository Trust Company: DTC's Formative Years and Creation of the Depository Trust & Clearing Corporation* (Ybk Publishers, Inc. 2008). The word "cede" means to "yield" and to "assign" because investors give up their stock and issuers give up their shareholders to an intermediary. *See* Donald, *The Rise and Effects of the Indirect Holding System*, at 60 (Cede & Co. is "the indirect hold[er] of nearly the entire economy").

Consistent with this "beneficial ownership" model, American courts have long held that *both* beneficial shareholders *and* shareholders of record have the right to bring derivative actions. *See, e.g.*, *HFG Co.*, 162 F.2d at 536; *Rosenthal v. Burry Biscuit Corp.*, 60 A.2d 106 (Del. Ch. 1948). Codifying this common-law rule in §626, the Legislature conferred the right to bring derivative actions on "holder[s] of … a *beneficial interest* in … shares" of "domestic or foreign corporation[s]." N.Y. BUS. CORP. LAW §626(a). By making §626 applicable to all "foreign corporation[s] doing business in this state, its directors, officers and shareholders," N.Y. BUS. CORP. LAW §1319(a), the Legislature cemented the right of beneficial shareholders to bring derivative actions on behalf of foreign corporations—*regardless of whether they have such right under the laws of the* (*foreign*) *incorporating state*.[36] Stevens, *New York Business Corporation Law of 1961*, at 174 ("[a]pplicable to all foreign

[36] The need to enforce New York's statutory regime is ever more important in today's increasing globalization of incorporation practices. The Cayman Islands, for example, has in recent years attracted thousands of corporations and hundreds of banks to incorporate there because it is a notorious tax haven. *See* Tax Justice Network *et al*., *The State of Tax Justice 2020*, at 38, 54 (Nov. 2020), *available at* https://taxjustice.net/wp-content/uploads/2020/11/The_State_of_Tax_Justice_2020_ENGLISH.pdf (last visited Sept. 23, 2024) (describing the Cayman Islands as "the world's greatest enabler" of "corporate tax abuse," "private tax evasion," and "financial secrecy"). The Federal Reserve Board warned that U.S. residents' holdings of foreign corporate securities rose from $6 trillion in 2006 to $14 trillion in 2022, three-quarters of which are in corporate stock. Board of Governors of the Federal Reserve System, *U.S. Portfolio Holdings of Foreign Securities*, at 5 (Dep't of the Treasury Oct. 2023), *available at* https://ticdata.treasury.gov/resource-center/data-chart-center/tic/Documents/shca2022_report.pdf (last visited Sept. 23, 2024). According to the Federal Reserve, "[i]n recent decades, U.S. holdings of securities issued by entities residing in the Cayman Islands rose more rapidly than U.S. holdings of other countries' securities." *Id*. at 8. As evident in *Davis*, an application of Cayman Islands' rules would result in dismissal of shareholder derivative actions involving Cayman Islands corporations. Applying New York law in this context is therefore critical in implementing the BCL's legislative purpose.

corporations are provisions of article 13 … relating to … derivative actions"). As Dean Stevens noted, application of New York law to foreign corporations is necessary to enforce the "sound policy" of New York:

> [I]t would be futile to enact into law what is considered a sound policy towards New York corporations if that law could be evaded by going to some other state to incorporate with the purpose of returning to New York to do business here.

Id. at 173.

By enacting BCL §1319, the Legislature ensured that New York-resident investors like Plaintiff have access to New York courts for bringing derivative actions against wayward fiduciaries of foreign companies doing business in New York. This legislative mandate further modernized the application of the internal-affairs doctrine, which originally called for jurisdictional exclusivity and required that derivative actions be brought only in the jurisdiction in which the subject company is incorporated. Verity Winship, *Bargaining for Exclusive State Court Jurisdiction*, STAN. J. OF COMPLEX LITIG., at 51 (2012) (noting that "[t]he modern [internal-affairs] doctrine does not dictate where a dispute is heard"). Courts have long refused to allow the internal-affairs doctrine to dictate the venue for shareholder derivative actions. *See 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"). Codifying this modern-day limitation on the internal-affairs doctrine,

the Legislature confers on New York courts jurisdiction over shareholder derivative actions involving "foreign corporation[s]." N.Y. BUS. CORP. LAW §626(a).

This legislative conferral of jurisdiction advances New York's policy—repeatedly announced by both the Legislature and the courts—to maintain and foster its position as "a national and international center for" commerce, finance, and law. *Intercontinental Planning, Ltd. v. Daystrom, Inc*., 24 N.Y.2d 372, 383–84 (1969) (finding that the Legislature "intended to protect not only [New York's] own residents, but also those who come into New York and take advantage of [New York's] position as an international clearing house and market place"). As this Court recognized in *Ehrlich-Bober*, New York's "undisputed status as the pre-eminent commercial and financial nerve center of the Nation and the world … naturally embraces a very strong policy of assuring ready access to a forum for redress of injuries arising out of transactions spawned here." 49 N.Y.2d at 581. Venue for complex shareholder derivative actions is properly laid in New York because its courts can "dispassionately administer[] a known, stable, and commercially sophisticated body of law." *Id*.

The filing of this case in the Commercial Division in Manhattan is appropriate in light of Plaintiff's New York residency and Barclays's New York-based conduct giving rise to Plaintiff's claims. Having conducted business in New York since the 1890s, and as the first British bank to list on the NYSE (where it trades today),

Barclays conducts a multi-billion-dollar operation out of its U.S. "head office"—its "second home market" aside from the U.K.—in a Midtown Manhattan skyscraper. R892 (¶297); R974; R1032. With thousands of employees in New York, Barclays and more than 20 of its subsidiaries are registered to do business here. R893 (¶299). Barclays' Board and Board committees have held over a dozen meetings in New York during the relevant period alleged in the FAC. R974. More importantly, New York is where the alleged wrongdoing occurred, where the $18 billion in fines were paid, and where Barclays contractually consented to be sued in numerous instances. R895 (¶303); R1264; R1300; R1337–1338; R1393–1424; R1425–1451.

In light of these facts,[37] and in light of the Legislature's intention to protect New York investors' access to New York courts for derivative claims, this Court must reverse the First Department's dismissal of the action based on the antiquated "registered ownership" requirement under English procedural law.

[37] Despite conceding that "whether Barclays was 'doing business' in New York for purposes of §1319 was not before the First Department … and is not before this Court" (Respondents' Br. at 30), Defendants argue that Barclays cannot be considered as "doing business" in New York based on its subsidiaries' conduct. As alleged in the FAC, however, Barclays itself maintains substantial contacts with New York and controls its New York-based subsidiaries. R892–897 (¶¶297–311); R937; R985; R1028; R1033. Thus, Barclays is presumed to be "sufficiently involved in the operation of the subsidiaries to become subject to jurisdiction." *Airtran N.Y., LLC v. Midwest Air Grp., Inc*., 46 A.D.3d 208, 219 (1st Dep't 2007). Defendants' reliance on BCL §1301 is misplaced because the facts of Barclays' New York litigation and New York Board meetings are just part of the overwhelming facts pleaded to establish Barclays' jurisdictional ties to New York. *See, e.g.*, R892–897 (¶¶297–311).

* * *

In sum, the text and legislative history of BCL §1319, as well as *Culligan*, command that §626 be applied to determine Plaintiff's derivative standing to sue. Plaintiff has standing to bring this derivative action because, as explained in Plaintiff's brief (Appellant's Br. at 39–48), Plaintiff has sufficiently alleged that it is a shareholder of Barclays, and that Barclays does business in New York within the meaning of §1319. By invoking the internal-affairs doctrine and applying English law on the issue of derivative standing, the lower court disregarded §1319's statutory directive and *Culligan*'s command. This is error and should be reversed.

II. This Court Should Require Compliance with *Davis*'s Directive to Apply New York's Gatekeeping Rules Governing Derivative Actions in New York Courts

Davis and *HSBC* command that BCL §626—New York's own gatekeeping rules—be applied to this action because the ECA's membership requirement is procedural and thus applicable only to shareholder derivative actions brought in English courts.[38]

Urging the Court to depart from *Davis* and *HSBC*, Defendants make two meritless procedural arguments. First, Defendants claim waiver. But Plaintiff did not waive this procedural-versus-substantive argument because it cited both *Davis*

[38] *Davis*, 30 N.Y.3d at 247; *Mason-Mahon v. Flint*, 166 A.D.3d 754 (2d Dep't 2018) ("*HSBC*").

and *HSBC* in its opposition to Defendants' motion to dismiss. R925, 941. Moreover, Plaintiff cited *Davis* and *HSBC* in the FAC, stating that "the procedural requirements of §261 of the [ECA] do not apply to this action." R864 (¶247).

Second, Defendants say that Plaintiff has admitted in its FAC that the ECA's membership requirement is substantive. Not so. The FAC states that the ECA "contains *both procedural* and substantive provisions." R776 (¶91). In fact, Plaintiff has pleaded that "Section 626 applies to all derivative shareholder lawsuits filed in New York." R864 (¶245).

Defendants' arguments for departing from *Davis* and *HSBC* fare no better. The title of Chapter 1, Part 11 of the ECA ("Derivative Claims in England …") and the text of §260 ("[t]his Chapter applies to proceedings in England … by a member of a company") conclusively establish that the membership requirement is procedural and applicable only to proceedings in the U.K. *Davis*, 30 N.Y.3d at 253–54. And *HSBC* precludes the application of the ECA's membership requirement to a derivative action brought in a New York court. 166 A.D.3d at 757.

Defendants' attempt to limit *HSBC* to only ECA §261 is wrong because all four sections (§§260–264) in Chapter 1 must be "construed as a whole and … its various sections must be considered together and with reference to each other." *People v. Mobil Oil Corp.*, 48 N.Y.2d 192, 199 (1979). Even *Arison*—the sole legal support cited by Defendants—recognizes that *HSBC* "could … be read broadly to

indicate that all provisions contained in Part 11, Chapter 1 of the [ECA], including that the action be brought by a 'member,' are procedural." 70 Misc. 3d at 250. Defendants' unduly limited interpretation of *HSBC* should be rejected.

Defendants' remaining arguments based on the right-versus-remedy and policy factors fare no better. Chapter 1 (ECA §§260–264) addresses the remedy—procedural in nature—for a member of the company to apply for court permission (in the U.K.) to "continue [a] claim as a derivative claim." THE COMPANIES ACT 2006 §261. This membership requirement is associated with a remedy—not a right. *Davis*, 30 N.Y.3d at 255–56 & n.9. Nor would interpreting Chapter 1 as procedural implicate any policy concerns with respect to comity because it would impose no burden on any U.K. courts. *Id.* at 256. Defendants' speculation about forum-shopping is unfounded because, as a New York resident, Plaintiff is entitled to sue in New York courts. *Cadet v. Short Line Terminal Agency, Inc.*, 173 A.D.2d 270, 271 (1st Dep't 1991).

Defendants come up with no justification for the First Department's departure from *Davis* and *HSBC*. This Court should reverse.

CONCLUSION

For the reasons set forth above and in Appellant's Brief, this Court should reverse.

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September 27, 2024

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In compliance with 22 NYCRR §500.13(c), the foregoing brief was prepared using the Microsoft Word word-processing system. A proportionally spaced typeface was used, as follows:

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