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Court of Appeals

STATE OF NEW YORK

REBECCA R. HAUSSMANN, TRUSTEE OF KONSTANTIN S. HAUSSMANN TRUST, and JACK E. CATTAN, Derivatively on behalf of BAYER AG,

Plaintiffs-Appellants,

against

WERNER BAUMANN, WERNER WENNING, LIAM CONDON, PAUL ACHLEITNER, OLIVER ZÜHLKE, SIMONE BAGEL-TRAH, NORBERT W. BISCHOFBERGER, ANDRE VAN BROICH, ERTHARIN COUSIN, THOMAS ELSNER, JOHANNA HANNEKE FABER, COLLEEN A. GOGGINS, HEIKE HAUSFELD, REINER HOFFMANN, FRANK LÖLLGEN, WOLFGANG PLISCHKE, PETRA REINBOLD-KNAPE, DETLEF RENNINGS,

(Caption Continued on the Reverse)

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Defendants-Respondents,

and

CHRISTIAN STRENGER, SULLIVAN & CROMWELL LLP, and LINKLATERS LLP,

Defendants.

BAYER AG,

Nominal Defendant-Respondent.

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PRELIMINARY STATEMENT

Consistent with the internal-affairs doctrine and *Eccles*,[1] Plaintiffs asserted claims under German substantive law—the GSCA[2]—to hold accountable Bayer's wayward fiduciaries who destroyed billions in shareholder value via the "worst acquisition in history."[3] Defendants transacted business in New York ("NY"). The Acquisition was negotiated, financed, and closed here—by Bayer's executive team and its NY-based advisors. Under BCL §1319 and §626, such NY nexus gave rise to subject-matter jurisdiction over Plaintiffs' claims and required application of §626's gatekeeping rules to this action. Defendants' NY contacts also triggered personal jurisdiction under CPLR §302. And because Plaintiffs' claims arose out of and related to Bayer's multi-billion-dollar agreements falling within GOL §5-1402's purview, this action was immune from a *forum-non-conveniens* dismissal under CPLR 327(b), which stripped NY courts of the power to grant such dismissals. But given the deference owed to a NY-resident Plaintiff's forum choice, and the action's overwhelming NY nexus, Defendants' *forum-non-conveniens* motion could never meet CPLR 327(a)'s "interests-of-justice" standard, and Defendants should never have prevailed.

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

[2] This reply adopts all terms defined in the June 13, 2024 Brief for Plaintiffs-Appellants ("Appellants' Br."). Unless otherwise noted, all emphases in quoted texts are added.

[3] *See* R303–304 (¶241).

But prevail they did. The lower courts disregarded the statutory mandates to exercise subject-matter jurisdiction over derivative actions, to apply NY's gatekeeping rules, and to assert personal jurisdiction based on CPLR §302's single-transaction test. The lower courts dismissed this action—dispatching Plaintiffs to Germany, where prosecution of these derivative claims will never occur. Reversal by this Court is necessary to ensure compliance with NY's statutory regime regulating foreign corporations doing business here, to preserve the jurisdiction of NY courts, and to protect access to justice for American investors.

A product of NY's century-old legal tradition,[4] demands of enormous financial growth,[5] and after years of legislative studies,[6] the 1961 BCL codified the subject-matter jurisdiction over derivative actions and the right of beneficial shareholders to sue. Specifically, §1319 mandated that NY's gatekeeping rules (*i.e.*, §626 and §627) apply to foreign corporations—if they do business here. This

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[4] NY courts have been exercising jurisdiction over shareholder derivative actions since the 1800s. *See Robinson v. Smith*, 3 Paige Ch. 222, 231–32 (N.Y. Ch. 1832). Under the intellectual leadership of Judge Benjamin N. Cardozo, NY courts have steadfastly exercised jurisdiction over out-of-state defendants, and applied NY law to foreign corporations. *Bagdon v. Phila. & Reading Coal & Iron Co.*, 217 N.Y. 432, 439 (1916) (Cardozo, J.); *see also German-American Coffee Co. v. Diehl*, 216 N.Y. 57, 65 (1915) (Cardozo, J.).

[5] *The History of NYSE*, INTERNATIONAL EXCHANGE, INC., at 4 (2024). For a more detailed discussion of the legislative history of the BCL, see pages 18 through 23 of the September 27, 2024 Reply Brief for Plaintiff-Appellant ("*Barclays* Appellant's Reply") in the companion *Barclays* appeal (APL-2024-00016).

[6] *See* Robert A. Kessler, *The New York Business Corporation Law*, ST. JOHN'S L. REV., Vol. 36, No. 1, Art. 1, at 4 (Dec. 1961).

modernized BCL aimed to protect American investors who almost universally owned stock in "street name,"[7] by securing their access to NY courts to bring derivative actions.

Two years later, the Legislature enacted CPLR §302 to "greatly expand" NY's personal jurisdiction over out-of-staters.[8] Then in 1983, after finding abusive use by out-of-staters of the *forum-non-conveniens* procedures, the Legislature enacted CPLR 327(b) stripping NY courts of the power to grant *forum-non-conveniens* dismissals where, as here, the action arises out of or relates to commercial agreements providing for NY jurisdiction and application of NY law.

These enactments are all part of the Legislature's efforts to preserve and foster NY's centrality in global commerce and preeminence in corporate finance. This statutory regime reflects the sound policies of NY to provide—and protect access to—a fair and efficient judicial system that is capable of "dispassionately administer[ing] a known, stable, and commercially sophisticated body of law."[9]

Invoking this statutory regime,[10] Plaintiffs—NY and California residents who own thousands of shares of Bayer stock—commenced this derivative action in the

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[7] *Id.* at 108 (identifying "protection to the shareholders" as a legislative purpose); *id.* at 3 (the BCL was "designed to … moderniz[e] … present law").

[8] Bill Jacket, L1962, Ch. 308, *Special Study of the Proposed Civil Practice Law and Related Bills*, at 1 (Nov. 28, 1960) (Addendum B).

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

[10] R239 (¶139) (the claims here are asserted "in [NY] Court via [NY's] procedural rules").

Commercial Division in Manhattan. This action's nexus to NY and NY's interest in exercising jurisdiction over Defendants are overwhelming. Having started doing business here in the late 1800s, Bayer has major connections with NY. Bayer stock is traded in NY via the Depository Agreement, under which Bayer has consented to NY jurisdiction and application of NY law in matters relating to its shares.

Bayer's $66 billion Acquisition of NYSE-listed Monsanto was centered in NY, where negotiations took place, where due diligence was conducted, and where billions in financing occurred.[11] To help pay for the Acquisition, Bayer made a $15 billion bond offering and, in the Offering Memorandum, again consented to NY jurisdiction and application of NY law. The debt financing—a "poison pill" that made Bayer unacquirable—was central to the Bayer Defendants' entrenchment scheme, which lay behind the catastrophic Acquisition.[12]

This was the "worst acquisition in history." Bayer's top executives fled with lush payouts and retirement packages, leaving behind the smoldering ruins of a once-prosperous corporation. Bayer wrote off the Acquisition.[13] Its finances were

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[11] *See*, *infra*, at 10–11.

[12] R182 (¶27).

[13] R168–177 (¶¶9–20). Since the commencement of this action in 2020, Bayer's situation got worse. Even after Bayer paid out $10 billion to settle thousands of claims, "juries continue to award additional billions of dollars in damages … threatening the 160 year old company's future." Maureen Farrell, *Years After Monsanto Deal, Bayer's RoundUp Bills Keep Piling Up*, THE N.Y. TIMES (Dec. 6, 2023).

overwhelmed by the Acquisition debt. Bayer's $2.40 per share dividend is gone. Bayer's shares, which once reached almost $40 per share, fell to $7. More than $150 billion in shareholder value evaporated.

Plaintiffs brought this action to recover damages for Bayer and its shareholders. Absent this action going forward, there will be no remedy for the egregious wrongdoing pleaded here, and no compensation for Bayer or its shareholders. Nor will there be accountability for the Bayer Defendants' breaches of the duties of "care and diligence"—assisted by the Bank Defendants.

Trying to avoid accountability, these Defendants dispute subject-matter jurisdiction, personal jurisdiction, and venue despite the overwhelming NY nexus of this action. Invoking the common-law internal-affairs doctrine, and disavowing their NY contacts, Defendants convinced the lower courts to apply German procedural law—*i.e.*, GSCA §148 "Court Procedure for Petitions Seeking Leave to File an Action for Damages"—and decline jurisdiction.

The lower courts did both, notwithstanding §1319's command to apply NY law. And for good measure, they dismissed this action for *forum non conveniens*. The central question in this appeal is two-fold:

> *Can NY-California resident owners of thousands of shares in a foreign corporation doing business in NY pursue a derivative action in a NY court under NY's gatekeeping rules*?

> *In light of Bayer's Depository Agreement and Offering Memorandum, does CPLR 327(b) bar a forum-non-conveniens dismissal*?

The Court should answer yes to both. The Legislature has indeed mandated so by enacting BCL §1319 and §626 and CPLR §302 and CPLR 327(b). That answer is faithful to the presumptive applicability, as recently affirmed in *Eccles*, of the internal-affairs doctrine on *substantive* issues.[14] And the answer is consistent with this Court's precedent in *Davis* requiring the application of NY's own procedural rules to shareholder derivative actions involving foreign corporations.[15]

Together with the companion appeal in *Barclays*, this appeal presents an opportunity for this Court to interpret BCL §1319 and CPLR 302(b) *for the first time* and implement the Legislative intent, reflected in the modernized statutory regime, to secure access for American investors to NY courts and preserve NY's status as the Nation's commercial and financial center.

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[14] Consistent with *Eccles*, Plaintiffs plead that the GSCA's substantive provisions govern the liability issues in this case. (R241–244 (¶¶142–144)).

[15] *Davis v. Scottish Re Group Ltd.*, 30 N.Y.3d 247, 257 (2017); *see also Mason-Mahon v Flint*, 166 A.D.3d 754 (2d Dep't 2018) ("*HSBC*") (following *Davis*).

ARGUMENT

I. Reversal Is Faithful to *Eccles* and the Internal-Affairs Doctrine, and Is Required by BCL §1319 and §626, Which Codified Jurisdiction over Derivative Actions Involving Foreign Corporations Doing Business in NY and Mandated the Application of NY's Gatekeeping Rules

Because this appeal and the *Barclays* appeal raise identical issues regarding BCL §1319, Plaintiffs adopt all arguments made by the *Barclays* Appellant in its September 27, 2024 Reply Brief regarding §1319 and incorporate by reference Argument I appearing on pages 7 through 24 of the *Barclays* Appellant's Reply.

In short, §1319's text and legislative history dictate that §626 govern the issue of derivative standing here. *Culligan Soft Water Co. v. Clayton Dubilier & Rice LLC*, 118 A.D.3d 422, 423 (1st Dep't 2014). Contrary to Defendants' argument, §1319 is a choice-of-law provision.[16] *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS, §6 cmt. a (1971). As a statutory directive, §1319 displaces the internal-affairs doctrine with respect to the GSCA's provisions on derivative standing. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS, §6(1) (1988). This position is consistent with *Eccles* and other precedent on the internal-affairs doctrine, all of which were decided outside the context of §1319 and pertained to the applicability of substantive law. GSCA §148 is inapplicable; BCL §626 applies here.

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[16] Contrary holdings in trial-court decisions, such as *Lewis v. Dicker*, 118 Misc. 2d 28 (Sup. Ct. Kings Cnty. 1982), lack analysis and conflict with *Culligan*. And §1319 applies to Bayer because it is "doing business" in NY. *See*, *infra*, at 10–17; *see also Airtran N.Y., LLC v. Midwest Air Grp., Inc.*, 46 A.D.3d 208, 219 (1st Dep't 2007) (parent is presumed to be "sufficiently involved in the operation of the subsidiaries to become subject to jurisdiction").

II. Reversal Is Required Because *Davis* Directs That NY's Gatekeeping Rules Govern Derivative Actions in NY Courts

Davis and *HSBC* command that BCL §626—NY's gatekeeping rules—be applied to this action because GSCA §148 "Court Procedure for Petitions" is applicable only to actions brought in Germany. Indeed, §148 refers to "[t]he regional court of the company's registered seat," directs assignment of actions to the "chamber for commercial matters," and authorizes the "state government" to "transfer jurisdiction." R446; R844. These references are specific to litigation in Germany and thus require a finding that §148 is "a procedural rule that does not apply in [NY] courts." *Davis*, 30 N.Y.3d at 253–54; *HSBC*, 166 A.D.3d at 755.

Defendants claim that §148 is substantive,[17] because §148(2)'s reference to "registered seat" indicates that the provision applies only to companies incorporated in Germany. But this reference is far from an *express* directive to apply §148 only to German corporations. As held in *Davis*, if the German legislature intended to make §148 applicable only to "actions involving [German] corporations anywhere around the world, it could have expressly provided as such." 30 N.Y.3d at 254. But nothing in §148 indicates that it has "extra-jurisdictional authority." *Id.* Because §148's text shows that it governs *only* proceedings in Germany, it is procedural.

Defendants say the requirement of registered ownership derives from GSCA

[17] The Court should disregard the "opinions" of Defendants' expert regarding whether any issue is substantive or procedural under German law. NY law determines "whether a given question is one of substance or procedure." *Kilberg v. N.E. Airlines*, 9 N.Y.2d 34, 41 (1961).

§67(2). But §67, entitled "[e]ntry in the share register," concerns only the procedure for registering shares and says nothing about derivative actions. R826. The purported "registered-shares" requirement appears only in §148(1)—granting standing to bring derivative claims to "[s]hareholders whose aggregate shareholdings equal or exceed one percent of the registered share capital or … EUR 100,000." *Id*. Defendants cannot evade *Davis* and *HSBC* by mis-identifying the source of the purported "registered-shares" requirement.

In any event, this "registered-shares" requirement is inapplicable. As explained by Plaintiffs' expert, shareholder rights are not limited by the GSCA to persons with a direct listing in the company's share register; persons who hold stock through "intermediaries" are also "shareholders" entitled to exercise their rights. R455; R469–472; R541–589. Were this "registered-shares" requirement applicable, most American investors would be excluded because, in the U.S. (unlike Germany), shares are almost universally held by intermediaries. R470, 561–563. Imposing a "registered-shares" requirement would violate §11's mandate that "all shareholders … have identical rights."[18] R455. Discrimination against U.S.-based shareholders violates NY policy. *Ehrlich-Bober*, 49 N.Y.2d at 581. This Court should reverse.

[18] Likewise unenforceable is §148(1)'s minimum-stock-holding requirement. *See Ehrlich-Bober*, 49 N.Y.2d at 581. Moreover, this requirement highlights the procedural nature of §148 because NY's gatekeeping rule—BCL §627—provides a bond requirement that mirrors §148(1)'s purpose of curbing meritless litigation.

III. Reversal Is Required Because the Facts Pleaded Show That Defendants Transacted Business in NY, Where the Acquisition Was Centered, Creating Subject-Matter Jurisdiction over the Derivative Claims and Personal Jurisdiction over Defendants

This Court should reverse because the Bayer Defendants' extensive NY contacts and resulting NY nexus support a finding of jurisdiction consistent with due process. Appellants' Br. at 22–38.[19]

A. Plaintiffs Satisfy CPLR §302 by Alleging That the Bayer Defendants Purposefully Transacted Business in NY, and That Their Transactions Have an Articulable Nexus to Plaintiffs' Claims

The Acquisition is NY-centric. It was negotiated, signed, financed, and closed in NY during 2016–18—years of constant work by the Bayer Defendants and their NY-based advisors acting as their agents. *E.g.*, R319–323 (¶¶271–277). Baumann and his team traveled to NY in September 2016 to negotiate the deal's final details:

> Final talks took place in [NY], culminating in a tete-a-tete dinner Tuesday evening between Baumann and Grant at Aretsky's Patroon … in midtown Manhattan—while advisers dined … at the office as they hammered out the final aspects of the deal.

R611.[20] To secure regulatory approval, Baumann and his team met President-Elect

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[19] In the alternative, the Court should remand to permit Plaintiffs to conduct jurisdictional discovery. Defendants admit that Plaintiffs requested discovery in the trial court. *See* R90.66; R1898. Defendants argue that the request was "perfunctory" and thus not a "sufficient start." Not so. Plaintiffs cited CPLR 3211(d) and cases supporting leave to take discovery. R1898. In any event, the "sufficient-start" requirement concerns not the sufficiency of the request, but the sufficiency of the facts that "may exist" to support jurisdiction. *Peterson v. Spartan Indus., Inc.*, 33 N.Y.2d 463, 467 (1974). Ample allegations support a finding of a "sufficient start." *E.g.*, R214–215 (¶73); R277–279 (¶¶202–204); R288–294 (¶¶223–225); R319–322 (¶¶271–274).

[20] Defendants claim that Plaintiffs failed to "offer[] any detail on what [Baumann and Grant] discussed" at dinner. Under the notice-pleading standard, however, it is a fair inference that they discussed the Acquisition. *Petit v. Dep't of Educ.*, 177 A.D.3d 402, 403 (1st Dep't 2019).

Trump in NY in January 2017. R322–323 (¶¶275–278).

The Bayer Defendants arranged financing for the Acquisition in NY, including a $50-plus billion bridge loan brokered by NY-based bankers. R214–215 (¶73); R277 (¶202); R320–322 (¶¶273–274). Defendants also conducted a $15 billion bond sale in NY. R214–215 (¶73); R277 (¶202); R688–689; R691–693. To sell these bonds, Baumann and Condon participated in NY investor conferences. R288–294 (¶¶223–225). The Offering Memorandum for the bonds contained consents to NY jurisdiction and to the application of NY law by Bayer and the Banks. R2440–2441.[21] The Acquisition closed at Sullivan & Cromwell's NY office in June 2018. R614. The NY-based JP Morgan, acting as "Paying Agent," transferred $57 billion to an account in NY to complete the Acquisition. R2514–2515; R2528–2532; R321–322 (¶274). Quickly discarding the Monsanto name, its business was integrated into Bayer CropScience, which was incorporated in NY.[22] R213–214 (¶72); R298–299 (¶¶232–234); R2439; R2514–2515.

Because the Bayer Defendants purposefully availed themselves of "'the privilege of conducting activities within [NY],'" they were "transacting business" in NY within the meaning of CPLR §302, and Bayer was "doing business" within the

[21] While the trial court denied jurisdictional discovery, it is almost certain that the documentation for this $50 billion loan by NY banks to Bayer contained consents to NY jurisdiction and application of NY law.

[22] Defendants complain that this fact was "unpleaded." But Monsanto's integration into the NY-incorporated Bayer CropScience was part of the Merger Agreement. R2521; R2534.

meaning of BCL §1319. *D&R Global Selections, S.L. v. Bodega Olegario Falcon Pineiro*, 29 N.Y.3d 292, 297–98 (2017). Every one of these contacts triggers §302 jurisdiction. *State of N.Y. v. Vayu, Inc.*, 39 N.Y.3d 330, 335 (2023).[23]

Defendants challenge Plaintiffs' allegations that NY was where the Merger Agreement was signed and where the Acquisition was closed, arguing that they are "inaccurate." At the pleadings stage, however, Plaintiffs' allegations must be taken as true.[24] *Corpuel v. Galasso*, 268 A.D.2d 202, 202 (1st Dep't 2000). In any event, the Merger Agreement itself required that "the closing of the Merger … shall take place at the offices of Sullivan & Cromwell LLP … [in NY]." R614.

The Bayer Defendants claim that the mere signing of a contract in NY is insufficient to establish long-arm jurisdiction. But their NY contacts go far beyond signing a contract—they negotiated, financed, and closed the Acquisition here. *E.g.*, R214–215 (¶73); R277 (¶202); R319–323 (¶¶271–278).[25]

The NY contacts alleged are not merely "responsive." The Bayer Defendants affirmatively directed their activities in and to NY by traveling here, negotiating here, employing advisors from here, and targeting investors here, in addition to

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[23] Defendants' attempt to distinguish *Vayu* is unavailing. In *Vayu*, this Court found personal jurisdiction based on allegations of NY contacts (meetings in and communications with NY over a two-year period) with less intensity and specificity than what Plaintiffs allege here. *See* 39 N.Y.3d at 333–34. *Vayu* requires a finding of §302 jurisdiction.

[24] Plaintiffs' verified allegations carry the weight of evidence. CPLR §105(u).

[25] *Presidential Realty Corp. v. Michael Square West, Ltd.* is inapposite because the only NY contact there was the purported signing of contract modifications. 44 N.Y.2d 672, 673 (1978).

conducting Bayer's ongoing business here. Their conduct stands in contrast with the "responsive" conduct in *Paterno v. Laser Spine Institute*, 24 N.Y.3d 370, 378 (2014). *Paterno* is inapposite. Nor does *Aquiline Capital Partners LLC v. Finarch LLC* help Defendants because the contacts there did not involve "drafting or negotiation of any … agreements." 861 F. Supp. 2d 378, 388 (S.D.N.Y. 2012).

Equally inapposite are *PaineWebber, Inc. v. Westgate Group, Inc*., 748 F. Supp. 115 (S.D.N.Y. 1990), and *Davis v. Scottish Re Group, Ltd*., 2016 N.Y. Misc. LEXIS 2607 (Sup. Ct. N.Y. Cnty. July 11, 2016). Those cases stand for the unremarkable proposition that incidental hiring of NY-based advisors, *without more*, does not give rise to §302 jurisdiction. The hiring of advisors in those cases had nothing to do with "[the advisor's] geographic location" and was thus found to be "incidental" and "[non]-essential." *PaineWebber*, 748 F. Supp. at 121; *Davis*, 2016 N.Y. Misc. LEXIS 2607, at *13 (following *PaineWebber*). Both cases turned on the *absence of other NY contacts* besides hiring advisors and performing "ministerial tasks." *PaineWebber*, 748 F. Supp. at 121 ("no negotiations occurred," nor was "financing" arranged "in [NY]"); *Davis*, 2016 N.Y. Misc. LEXIS 2607, at *13. Here, the Bayer Defendants hired NY-based advisors to conduct due diligence and raise funds here for the Acquisition—exactly the kind of contacts that the *PaineWebber* court found to be lacking. R214–215 (¶73); R277 (¶202); R688–689; R691–693.

Defendants mischaracterize as "conclusory" and "genetical" Plaintiffs' allegations that the Bayer Defendants controlled the Acquisition and their NY-based advisers' activities. But Plaintiffs allege in detail that the Bayer Defendants made *all* key decisions and were involved in *all* aspects of the Acquisition, which entrenched them. *See*, *infra*, at 27. The Bayer Defendants "focused particularly" on the "performance of the Monsanto business, the related risks of the business" including "the status of the [Roundup] litigations." R246–248 (¶¶150–152). These allegations support a finding that the Bayer Defendants are subject to jurisdiction as "primary actors" with respect to the same NY transactions that give rise to personal jurisdiction over Bayer. *See Madden v. Int'l Ass'n of Heat & Frost Insulators & Asbestos Workers*, 889 F. Supp. 707, 711 (S.D.N.Y. 1995).

In an attempt to deny the clear "articulable nexus" between their NY contacts and the claims asserted, the Bayer Defendants disregard the allegations that the Acquisition and their entrenchment scheme were dependent on Bayer's NY transactions. R336 (¶303). Plaintiffs also allege that the failed due diligence "was done in significant part out of [NY], including the [NY] offices of Sullivan & Cromwell, Bank of America, [and] Credit Suisse." R319 (¶271). These allegations satisfy §302(a)(1). *See Rushaid v. Pictet & Cie*, 28 N.Y.3d 316, 339 (2016).

Finally, Defendants argue that the claims asserted have only an "attenuated" link to their NY contacts at issue. But this argument conflicts with the well-pleaded

facts regarding the substantial relationship between the Acquisition and NY, including the negotiations, due diligence, financing, regulatory approval, and closing. *E.g.*, R214–215 (¶73); R277 (¶202); R319–323 (¶¶271–278); R611; R614. Without the negotiations and financing in NY, the Acquisition would not have been accomplished. Plaintiffs' allegations must be considered as a whole and presumed as true. *Longines-Wittnauer Watch Co. v. Barnes & Reinecke, Inc.*, 15 N.Y.2d 443, 457 n.5 (1965). Plaintiffs' allegations satisfy §302.

Still, Defendants latch onto the so-called "concession" by Plaintiffs that the NY-based financing, standing alone, did not give rise to their claims. But Plaintiffs' claims arise from the Bayer Defendants' breaches of their duties in connection with the Acquisition, which was centered in NY. The fact that a particular NY contact, standing alone, does not give rise to Plaintiffs' claims cannot preclude a finding that Plaintiffs' claims overall arise from the NY-centric Acquisition.

B. Exercising Jurisdiction Is Consistent with Due Process

Plaintiffs' allegations of the Bayer Defendants' NY contacts establish §302 jurisdiction and, as a matter of law, satisfy the requirement of due process because §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). Defendants have no answer to this rule. No precedent supports their due-process claim.

Nor do the Bayer Defendants, as required under *Asahi*,[26] submit any proof of hardship from litigating in NY. After all, they "purposefully avail[ed] [themselves] of the privilege of conducting activities [in NY]." *LaMarca v. Pak-Mor Mfg. Co*., 95 N.Y.2d 210, 216 (2000). Bayer has been doing business in NY for a century (R213 (¶70)),[27] and is a party to multiple contracts consenting to NY jurisdiction and application of NY law (R2440–2441)). Bayer and its subsidiaries filed over 60 lawsuits in NY. R591–595. These facts preclude the Bayer Defendants from claiming hardship. Exercising jurisdiction over them comports with "traditional notions of fair play and substantial justice." *LaMarca*, 95 N.Y.2d at 218.

NY has a substantial interest in adjudicating this dispute. The Legislature enacted BCL §1319 and §626 to protect shareholders' right to bring derivative actions involving foreign corporations. *See Gucci Am., Inc. v. Weixing Li*, 135 F. Supp. 3d 87, 100 (S.D.N.Y. 2015) (court has "a powerful interest in enforcing [legislative] acts"). Here, NY's interest is overwhelming because multi-billion-dollar financings were arranged in NY, the Acquisition was negotiated here, and due diligence was done here. *MM Global Servs. Inc. v. Dow Chem. Co*., 404 F. Supp. 2d 425, 435 (D. Conn. 2005) (finding interest where "forum market was injured").

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[26] *Asahi Metal Indus. Co. v. Super. Ct*., 480 U.S. 102 (1987).

[27] *AlbaniaBEG Ambient Sh.p.k v. Enel S.p.A*. is distinguishable because defendants there neither did business nor owned property in NY. 160 A.D.3d 93, 98 (1st Dep't 2018). Defendants' reliance on *AlbaniaBEG* is misplaced.

Plaintiffs—residents of NY and California—have a substantial interest in obtaining convenient and effective relief in a NY court. *LaMarca*, 95 N.Y.2d at 218. Forcing Plaintiffs to sue in Germany is unduly burdensome in light of the geographical distance and differences in legal customs and practices. *See Opticare Acquisition Corp. v. Castillo*, 25 A.D.3d 238, 249 (2d Dep't 2005).

Consideration of the judicial systems' interest weighs in favor of exercising jurisdiction. Because Plaintiffs invoke the substantive law of Germany, Germany's interest in enforcing its laws is satisfied. NY courts are experienced in handling complex cases involving foreign laws. *Duncan-Watt v. Rockefeller*, 2018 N.Y. Misc. LEXIS 1383, at **12–13 (Sup. Ct. N.Y. Cnty. Apr. 13, 2018). And NY courts have a substantial interest in resolving this dispute in light of the NY-centric nature of the Acquisition. *Williams v. Beemiller, Inc.*, 33 N.Y.3d 523, 560 (2019).

IV. Reversal Is Required Because CPLR 327(b) Prohibits Courts from Granting *Forum-Non-Conveniens* Dismissals Due to Bayer's Agreements Consenting to NY Jurisdiction and Application of NY Law

The Court should review the *forum-non-conveniens* issue as the First Department "ha[s] considered" Plaintiffs' challenges to the trial court's CPLR 327 rulings and "[found] them unavailing." R2569. This appeal presents an opportunity for this Court to interpret CPLR 327(b) *for the first time* and to set the standard for the deference due to NY residents' choice of forum in a CPLR 327(a) analysis. Reversal of the trial court's CPLR 327(a) dismissal is necessary to prevent a giant

foreign corporation that conducts multi-billion-dollar businesses in NY from evading the statutory mandate of jurisdiction. Reversal is also necessary to avoid a pyrrhic victory if Plaintiffs prevail on the BCL §1319 and CPLR §302 issues only to still face a *forum-non-conveniens* dismissal.

A. The Trial Court Erred in Denying Leave to Renew and Reargue Because the Issue of Its Statutory Power Was Not—and Cannot Be—Waived, Because Plaintiffs Satisfy CPLR 2221, and Because the Interest of Justice Requires Renewal

To avoid review of the *forum-non-conveniens* rulings, Defendants make two meritless claims. First, they claim waiver. But this Court held in *Title Guarantee & Trust Co. v. Foxvale Realty Corp*. that a legal question pertaining to "limitations upon the statutory power of the court" cannot be waived. 287 N.Y. 147, 149 (1941). Defendants have no answer to *Title Guarantee*. Instead, they rely on *Nurlybayev v. SmileDirectClub, Inc*., 205 A.D.3d 455 (1st Dep't 2022), where the First Department found waiver because the CPLR 327(b) argument was never presented to the trial court. But *Nurlybayev* did not consider *Title Guarantee*. And Plaintiffs *did* raise CPLR 327(b) in the trial court. *Nurlybayev* does not require a finding of waiver.

Second, Defendants fault Plaintiffs for failing to fit their motion in CPLR 2221's stricture. But Plaintiffs satisfied the requirements for leave to reargue because the trial court overlooked the submission-to-jurisdiction and choice-of-New-York-law clauses in the Depositary Agreement and the Offering Memorandum, both of which were pleaded in the Complaint. R214–215 (¶73);

R312 (¶258); R318 (¶269); R320–322 (¶¶273–274). The trial court also misapprehended the law when it exceeded its power under CPLR 327(b). As such, the trial court erred in denying reargument. *Whelan v. GTE Sylvania, Inc*., 182 A.D.2d 446, 450 (1st Dep't 1992).

Plaintiffs satisfy the requirements for renewal because the trial court did not have the benefit of the complete underlying agreements. Nor were these facts presented to the trial court in the context of CPLR 327(b). And Plaintiffs were prevented from presenting their CPLR 327(b) argument because the scheduled second hearing never took place. R2497–2498. These circumstances justify renewal because "the equities" would be "properly served." *Leary v. Bendow*, 161 A.D.3d 420, 421 (1st Dep't 2018). In any event, the trial court should have granted renewal "in the interest of justice." *Mejia v. Nanni*, 307 A.D.2d 870, 871 (1st Dep't 2003).

B. The Trial Court Exceeded CPLR 327(b)'s Limitation on Its Power in Granting a *Forum-Non-Conveniens* Dismissal Because This Action Arises out of and Relates to Agreements Falling Within GOL §5-1402's Purview

Where the action "arises out of or relates to" contracts falling within the GOL §5-1402's purview, CPLR 327(b) prohibits courts from granting a *forum-non-conveniens* dismissal. *Nat'l Union Fire Ins. Co. v. Worley*, 257 A.D.2d 228, 230 (1st Dep't 1999). Defendants' three-point opposition to this statutory proscription of the courts' power lacks support from statutory text and case law.

First, citing an inapposite trial-court decision, Defendants argue that, to meet

the "arising-out-of-or-relating-to" test, "Plaintiffs must establish that their claims 'depend[] on rights and duties that must be analyzed with references to' each agreement." Respondents' Br. at 59 (quoting *Imaging Holdings I, LP v. Israel Aerospace Indus. Ltd.*, 2009 N.Y. Misc. LEXIS 3630, at *9 (Sup. Ct. N.Y. Cnty. Dec. 11, 2009)). But the test applied by *Imaging* and quoted by Defendants deals with an argument unrelated to CPLR 327(b) and GOL §5-1402. Rather, it addresses the issue of whether the choice-of-law and consent-to-jurisdiction clauses in one contract would control claims relating to different contracts. *See Imaging*, 2009 N.Y. Misc. LEXIS 3630, at **7–9. In fact, when analyzing the underlying contracts under CPLR 327(b) and GOL §5-1402, the court in *Imaging* found itself to "ha[ve] little discretion" but to follow "this statutory construct … [and] clear instructions that [the court] must grant jurisdiction over the plaintiffs' claims relating to the [underlying contract]." *Id*. at *18. Because nothing in *Imaging* limits the reach of CPLR 327(b)'s "arising-out-of-or-relating-to" test, Defendants' reliance on *Imaging* is misplaced. The definition of "arising-out-of-or-relating-to" is exceedingly broad and thus dictates a finding that this action arises out of and relates to the Depositary Agreement and the Offering Memorandum. Appellants' Br. at 46–49.

Second, Defendants trivialize the nexus between Plaintiffs' claims and the underlying agreements. But Defendants' argument is belied by the fact that both the Depositary Agreement and the Offering Memorandum are pleaded in the Complaint.

R312 (¶258); R318 (¶269); R214–215 (¶73). Plaintiffs' claims relate to the Depositary Agreement because they are brought on behalf of Bayer and its shareholders, including ADR holders. *See Batchelder v. Kawamoto*, 147 F.3d 915, 917–19 (9th Cir. 1998). And the Offering Memorandum was part of the financing for the Acquisition that gave rise to Plaintiffs' claims. But for the bond offering, the proceeds of which were used to pay down the Acquisition debt (R321 (¶274)), the Acquisition would not have been possible and the Bayer Defendants' entrenchment scheme (R168 (¶9)) would not have succeeded. Defendants' arguments based on timing and "causal relationship" are nothing more than a disagreement with the exceedingly broad construction that courts have given to statutes employing the terms "arises-out-of" and "relates-to." *Planned Consumer Mktg., Inc. v. Coats & Clark, Inc.*, 71 N.Y.2d 442, 448 (1988).

Third, the Bank Defendants claim that they can avoid CPLR 327(b) because they were not parties to the underlying agreements. But Credit Suisse was a party to the Offering Memorandum because it arranged the $15 billion bond offering (R321 (¶274)), and because its wholly-owned subsidiary, Credit Suisse Securities (USA) LLC ("CSSU"), was listed as a Joint Book Runner (R321 (¶273)).

Nothing in the text of CPLR 327(b) and GOL §5-1402 requires any Defendants to be parties to the underlying agreements. So long as Plaintiffs' claims "arise out of" or "relate to" these agreements, CPLR 327(b) bars a *forum-non-*

conveniens dismissal. CPLR 327(b) is the Legislature's declaration of NY's "public policy" that NY courts must accept jurisdiction over actions involving out-of-staters that have consented to NY jurisdiction. *Lumbermens Mut. Cas. Co. v. Commonwealth*, 52 A.D.3d 212, 212 (1st Dep't 2008). CPLR 327(b) is mandatory—regardless of whether the parties to the agreements overlap with the parties to the action.

This broad interpretation of CPLR 327(b) finds support in legislative history. As part of modernizing the CPLR in 1970, the Legislature enacted CPLR 327(a) to codify NY's common-law rules on *forum non conveniens*. But experience from the ensuing decade showed that trial courts were granting CPLR 327(a) dismissals, even though the cases related to large commercial contracts providing for NY jurisdiction. *See* Bill Jacket, L 1984, ch. 421, *The Assembly Bill No. 7307-A*, *Memorandum in Support by Senator John J. Marchi*, at 1 (June 25, 1984) (Addendum C). Considering these dismissals to be an "ero[sion]" of NY's status as "the world's leading center for international finance," the Legislature unanimously passed GOL §5-1402 and CPLR 327(b) to strip the courts of the power to grant *forum-non-conveniens* motions. Bill Jacket, L 1984, ch. 421, *The Assembly Bill No. 7307-A*, *Note on Voting*, at 5–9 (June 25, 1984) (Addendum D). The Legislature "foreclose[d] use of [CPLR 327(a)] as an 'escape hatch' from enforcement of … GOL §5-1402." Michael J. Virgadamo, *CPLR 327(b): Forum Non Conveniens*

Relief May No Longer Be Granted by a Court If, Pursuant to Certain Contracts, the Parties Have Agreed on New York as Their Choice of Forum in Accordance with Section 5-1402 of the GOL, ST. JOHN'S L. REV., Vol. 59 No. 2, Art. 10, at 415 n.6 (Winter 1985).

During the deliberative process, the Legislature recognized that NY's status as "one of the world's major financial and commercial centers … [was] by no means unchallenged." Bill Jacket, L 1984, ch. 421, *Memorandum in Support*, at 1. "[A]s business has become more geographically diverse," it was "important to permit actors to choose the law of a jurisdiction with a well-developed system of commercial jurisprudence," and that if a "dispute does arise… it may be heard by a [NY] court[,] … *even where the conduct is not governed by* [*NY*] *law*." *Id*. at 2.

CPLR 327(b) was designed to benefit NY's financial community and its service industries, including law firms. Both the Association of the Bar of the City of New York and the State Bankers Association supported CPLR 327(b)'s enactment to secure "unhampered access to [NY] courts in the event of a dispute":

> [*NY*] *law must be amended to provide for mandatory enforcement of forum selection clauses and choice-of-law provisions in large international commercial contracts*.

Bill Jacket, L 1984, ch. 421, *The Assembly Bill No. 7307-A, Committee Report*, at 549 (1984) (Addendum E).

C. Even If a CPLR 327(a) Motion Can Be Properly Considered, Defendants Do Not—and Cannot—Carry Their Heavy Burden of Showing Inconvenience and Oppression and Rebutting Plaintiffs' Presumptive Entitlement to Sue in NY

Defendants cannot rebut Plaintiffs' presumptive entitlement to sue in NY. The trial court's failure to accord any deference to Plaintiffs' choice of forum is legal error and must be reversed under a *de novo* review. *Mashreqbank PSC v. Ahmed Hamad Al Gosaibi & Bros. Co*., 23 N.Y.3d 129, 137 (2014). Under settled law, a NY-resident plaintiff's choice of a NY forum is entitled to presumptive weight. Appellants' Br. at 51–55. NY courts have given deference to such "presumptive[] entitle[ment]" to NY-resident shareholders who brought derivative actions on behalf of foreign corporations. *Broida v. Bancroft*, 103 A.D.2d 88, 92 (2d Dep't 1984). A resident plaintiff's forum choice must be accorded extra weight where, as here, the proposed alternative forum is in a foreign country. *Swift & Co. Packers v. Compania Colombiana Del Caribe*, 339 U.S. 684, 697 (1950).

Defendants have no answer to *Swift & Co*., but instead cite inapposite cases. *Koster v. (American) Lumbermens Mutual Casualty Co.* gave little weight to the shareholder plaintiff's choice of a NY forum because "[he] was utterly silent as to any reason of convenience [of a NY forum] to himself or to witnesses and as to any advantage to him in expense, speed of trial, or adequacy of remedy." 330 U.S. 518, 531 (1947). Aside from plaintiff's NY residency, the underlying claims in *Koster* had no nexus to NY. *Id.* In contrast, Plaintiffs here have alleged and submitted

ample facts demonstrating the NY-centric nature of the Acquisition, as well as the substantial nexus between NY and the underlying claims. *See*, *supra*, at 10–11. *Koster* gives Defendants no aid.

Shin-Etsu Chemical Co. v. ICICI Bank Ltd. involved a foreign contract dispute between a Japanese corporation and an Indian bank, where no underlying events occurred in NY. 9 A.D.3d 171, 172 (1st Dep't 2004). The only purported "nexus" to NY was that the Indian bank's "shares were traded on the [NYSE]." *Id.* at 175. In contrast, the Acquisition was negotiated, financed, and closed in NY, and Bayer's lawyers and bankers were based in NY. *See*, *supra*, at 10–11. Contrary to Defendants' argument, the NY nexus here is much greater than that in *Viking Global Equities, LP v. Porsche Automobil Holding SE*, where "the only alleged connections between the action and NY [were] the phone calls between [the parties], and the emails sent to plaintiffs in [NY] but generally disseminated to parties elsewhere." 101 A.D.3d 640, 641 (1st Dep't 2012). *Shin-Etsu* and *Viking* are inapposite.

Estate of Kainer v. UBS AG involved a dispute over a painting misappropriated by Nazis in Europe and sold in NY. 175 A.D.3d 403, 403 (1st Dep't 2019). None of the 12 plaintiffs resided in NY, "and all but one reside[d] outside of the United States." *Id.* Available alternative forums existed in Europe. *Id.* Under those facts, the court granted a *forum-non-conveniens* dismissal. *Id.* In contrast, Plaintiffs reside in NY and California, their German-law claims are subject to a

negligence standard familiar to NY courts, and no adequate alternative forum exists.

Defendants did not—and cannot—carry their "'heavy burden' of establishing that NY is an inconvenient forum[,] and that a substantial nexus between [NY] and the action is lacking." *Elmaliach v. Bank of China Ltd.*, 110 A.D.3d 192, 208 (1st Dep't 2013). *Defendants proffered no evidence of hardship*. Nor could they since Bayer and its subsidiaries are frequent litigants in NY—suing over 60 times in NY courts.[28] R591–595. That some evidence is located in Germany, standing alone, is insufficient to "'establish such oppression … as to be out of all proportion to plaintiff's convenience.'" *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 102 (2d Cir. 2000). As held in *Elmaliach*, a case against a Chinese Bank, China's interest in regulating its own banks could not outweigh NY's interest in adjudicating a dispute with a NY nexus. *Id*. at 208–09.

V. The Court Should Not Consider the Proposed Alternative Grounds for Affirmance, Which Are, in Any Event, Without Merit

This Court generally will not consider issues that the lower courts did not decide. *Dougherty v. Lion Fire Ins. Co.*, 183 N.Y. 302, 306 (1905). Review should be declined if the proposed alternative grounds are "addressed to the [lower] court's discretion," or involve fact-intensive inquiries. *Rushaid*, 28 N.Y.3d at 332.

[28] "It ill behooves [the Bayer Defendants] to now urge the contrary" in a *forum-non-conveniens* motion. *Broida*, 103 A.D.2d at 92–93.

A. The Court Should Reject the Bayer Defendants' Arguments for Affirmance Based on Demand Futility and Stock Ownership

The Court should decline to consider the demand-futility issue because it requires a fact-intensive analysis subject to an abuse-of-discretion review. *Marx v. Akers*, 88 N.Y.2d 189, 193–94 (1996). In any event, Plaintiffs sufficiently alleged demand futility. The Bayer directors are all "interested" because they pursued the Acquisition to entrench themselves. *E.g.*, R286 (¶219); R330–338 (¶¶295–306). "Directors may not act out of a … primary motive of entrenchment." *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). Moreover, the Acquisition—the "worst … in history" (R303–304 (¶241))—is similar to the alleged wrongdoing in *HSBC*, which involved the "payment in excess of $1.5 billion in fines and penalties to authorities." 166 A.D.3d at 758–59. Like *HSBC*, this Court should find demand futility here.

Plaintiffs allege that they have owned Bayer shares "throughout the period of alleged wrongdoing, and continue to own and hold them today." R211 (¶66). Because §626 requires no particularity for pleading stock ownership, notice-pleading is sufficient.[29] *Galdi v. Jones*, 141 F.2d 984, 992 (2d Cir. 1944).

[29] *Independent Investor Protective League v. Time, Inc.*—decided on summary judgment—says nothing about pleading standards. 50 N.Y.2d 259, 262 (1980).

B. The Court Should Reject the Bank Defendants' Arguments for Affirmance Based on Jurisdiction and Failure to State a Claim

The Court should decline to consider the Credit Suisse Defendants' contest to personal jurisdiction or remand it to the trial court. *David v. Fuchs*, 204 A.D.2d 253, 254 (1st Dep't 1994). In any event, Plaintiffs have sufficiently alleged jurisdiction over them. Due diligence over the Acquisition was done "out of [NY], including the [NY] offices of … Credit Suisse." R319 (¶271). "The bond offering was arranged and led by Credit Suisse, and was [c]entered in [NY]." R321 (¶274). Credit Suisse admitted that its NY-based subsidiary, CSSU, worked on the Acquisition. R393.

The Bank Defendants controlled their subsidiaries or affiliates that performed the Acquisition work. R629–632; R634–636; R628–639; R646. They benefitted from the $700 million fees from the Acquisition (R276 (¶200)), as their NY offices helped entrench the Bayer insiders, failed to conduct due diligence, and managed the financing. R277–279 (¶¶202–204). The Bank Defendants are properly named.

CPLR 3016(b) is inapplicable because Plaintiffs assert a negligence claim. *In re Netshoes Sec. Litig.*, 64 Misc. 3d 926, 931 (Sup. Ct. N.Y. Cnty. 2019). Even if it applies, Plaintiffs plead with particularity that the Bank Defendants failed to conduct due diligence, suffered conflicts of interest, and furthered the entrenchment scheme. R182 (¶27); R200–201 (¶¶50–52); R275–276 (¶¶197–199), R277–280 (¶¶203–205); R280 (¶207). Plaintiffs state a claim. *CIFG Assurance N. Am., Inc. v. J.P. Morgan Sec. LLC*, 146 A.D.3d 60, 63 (1st Dep't 2016).

CONCLUSION

For the reasons set forth above and in Appellants' Brief, the Court should reverse and remand.

Dated: New York, New York
September 27, 2024

Respectfully submitted,

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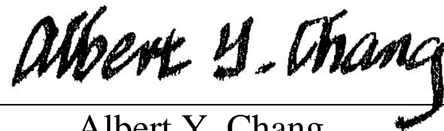

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CERTIFICATE OF COMPLIANCE

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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