APL-2024-00016
New York County Clerk's Office Index No. 656400/2020
Appellate Division–First Department Case No. 2022-04657

Court of Appeals

of the

State of New York

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

Plaintiff-Appellant,

(For Continuation of Caption See Inside Cover)

BRIEF FOR *AMICI CURIAE* SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION AND INSTITUTE OF INTERNATIONAL BANKERS

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Date Completed: October 28, 2024

– 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, SIMON FRASER, STEPHEN RUSSELL, JOHN MCFARLANE, NIGEL HIGGINS, JAMES "JES" STALEY, CRAWFORD S. GILLIES, MATTHEW LESTER, MICHAEL ASHLEY, TIMOTHY J. BREEDON, SIR IAN M. CHESHIRE, MARY ANNE CITRINO, MARY ELIZABETH FRANCIS, TUSHAR MORZARIA, DIANE L. SCHUENEMAN, MICHAEL ROEMER, TIMOTHY "TIM" THROSBY, C.S. VENKATAKRISHNAN, ROBERT LE BLANC, THOMAS KING, JOHN CARROLL, JERRY DEL MISSIER, JUDITH SHEPHERD, JOHN S. VARLEY, ROGER JENKINS, THOMAS L. KALARIS, JONATHAN HUGHES, MARK HARDING, RICHARD RICCI, MITCHELL COX, ANDREW TINNEY, LAURA PADOVAN and BARCLAYS CAPITAL INC.,

Defendants-Respondents,

– and –

BARCLAYS PLC,

Nominal Defendant-Respondent.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 500.1(f) of the Rules of Practice of the Court of Appeals of the State of New York, the Securities Industry and Financial Markets Association ("SIFMA") and the Institute of International Bankers ("IIB") certify that they have no parent corporations, subsidiaries, or affiliates.

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INTEREST OF *AMICI CURIAE*

The Securities Industry and Financial Markets Association ("SIFMA") is the leading trade association for broker-dealers, investment banks, and asset managers operating in the U.S. and global capital markets. On behalf of the industry's one million employees, SIFMA advocates on legislation, regulation, and business policy affecting retail and institutional investors, equity and fixed income markets, and related products and services. SIFMA serves as an industry coordinating body to promote fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. SIFMA also provides a forum for industry policy and professional development. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association ("GFMA").

The Institute of International Bankers ("IIB") is the only national association devoted exclusively to representing, advancing, and protecting the interests of the international banking community in the United States. Its members include internationally headquartered banks and financial institutions from more than 35 countries. U.S. operations of IIB members enhance the depth and liquidity of U.S. financial markets and contribute more than $50 billion to the U.S. economy.

Amici, whose members include many multistate or international corporations, have a strong interest in this case. The internal affairs doctrine has

long been understood to impose a strong presumption in favor of applying the law of the state of incorporation to intra-corporate disputes. The consistent enforcement of the internal affairs doctrine serves the interests of corporations and their internal constituencies—shareholders, directors, and officers—by ensuring that disputes concerning corporate governance are ordinarily resolved under a single, easily identifiable law of which internal constituencies are on notice before associating themselves with the corporation.[1]

[1] *Amici* counsel Sullivan & Cromwell LLP ("S&C") was initially named as a defendant in a related derivative suit against Bayer AG for which the Court of Appeals also granted review, *Haussmann* v. *Baumann*, case nos. 651500/20 (Sup. Ct., N.Y. Cnty.), 2022-02491, 2022-04806 (1st Dep't), 2024-00017 (N.Y.). On June 26, 2020, Plaintiffs dismissed S&C from the case without prejudice. No S&C lawyer representing *Amici* before this Court represented Bayer in connection with any of the matters that are the subject of the complaint in *Haussmann*. S&C represents non-U.S. defendants in three other pending derivative actions in New York courts: *Cattan* v. *Ermotti*, case nos. 652270/2020 (Sup. Ct., N.Y. Cnty.), 2022-02492, 2022-04653, 2022-04654 (1st Dep't); *City of Philadelphia Bd. of Pensions & Retirement* v. *Winters*, case nos. 601438/2020 (Sup. Ct., Nassau Cnty.), 2022-01561 (2d Dep't); and *Lambinet* v. *Pötsch*, case no. 652830/2021 (Sup. Ct., N.Y. Cnty.).

QUESTIONS PRESENTED

As set forth in Defendants-Respondents' brief:

Question 1: Whether, consistent with more than six decades of New York precedent as well as the statutory language and legislative history, Business Corporation Law Sections 1319 and 626 confer subject-matter jurisdiction on New York courts to hear foreign derivative actions but do not displace New York's longstanding common law internal affairs doctrine.

Question 2: Whether Section 260 of the United Kingdom's Companies Act of 2006, which permits only registered members to bring a shareholder derivative action, is a substantive requirement of English law.

PRELIMINARY STATEMENT

This is an audacious lawsuit. Appellant proposes to turn one of the bedrock principles of New York corporate law on its head based on a strained interpretation, never embraced by any New York court, of two 60-year-old statutes. It is part of a wave of purported shareholder derivative lawsuits against directors, officers, and affiliates of European companies under foreign law based on foreign conduct. Plaintiffs and their counsel have brought these "test" lawsuits to try to turn New York's overburdened courts into a Shangri-La for the resolution of governance disputes involving non-U.S. companies that have long been litigated elsewhere.

These cases have no business being litigated in New York courts. But if they are, then New York courts should apply the longstanding internal affairs doctrine, which this Court reaffirmed earlier this year in *Eccles* v. *Shamrock Capital Advisors, LLC*, — N.Y.3d —, 2024 WL 2331737 (May 23, 2024). Under that doctrine, foreign corporate disputes are subject to the law of the place of incorporation—here, the corporate law of England.

Both the trial court and the First Department rightly held that Appellant's claim should be dismissed for lack of standing under the English Companies Act. For decades, New York courts have held that under the internal affairs doctrine, foreign derivative suits must comply with the substantive requirements of the law of a company's place of incorporation. In this case, the

English Companies Act directs that only a registered member of a company can bring a derivative suit. The First Department correctly held that this membership requirement is substantive under longstanding New York law. There is no dispute that Appellant has failed to comply with the Companies Act's membership requirement.

The First Department's application of the internal affairs doctrine supports several important interests long recognized by New York courts.

First, the internal affairs doctrine's strong presumption in favor of the law of the place of incorporation respects New York shareholders' voluntary choice to invest in foreign companies governed by foreign law. Respecting shareholders' choice encourages companies to incorporate in jurisdictions that shareholders prefer. It also provides shareholders and corporations, as well as corporate directors and officers, with predictability and consistency as to which law will apply to corporate governance and intra-corporate disputes.

Second, weakening the internal affairs doctrine would flood New York courts with claims against foreign defendants purportedly brought on behalf of foreign corporations, in actions having little or no connection to New York. As explained below, the vast majority of states respect the internal affairs doctrine. *See infra* at 18. If New York abandons that doctrine in cases against foreign companies, our courts would become the jurisdiction of choice for derivative lawsuits from

across the globe by plaintiffs seeking to sidestep the requirements of a company's home jurisdiction. Over the past few years, at least seven derivative suits have been filed in New York State courts against directors and officers of European corporations, many by the same plaintiff, and nearly all by the same plaintiffs' counsel. The lower courts have consistently rejected these baseless suits on a number of grounds, and this Court should put the final nail in the proverbial coffin of them.

Third, New York's long history of respect for international companies organized under the rules of their chosen jurisdictions serves New York's position as a global finance and business center. The internal affairs doctrine allows foreign companies to conduct business in New York, while abiding by the corporate governance rules of their respective places of incorporation. Weakening the internal affairs doctrine and the predictability it has fostered would impair New York's attractiveness and competitiveness for foreign companies.

Fourth, abrogating the internal affairs doctrine in cases against foreign companies would violate fundamental principles of international comity. Foreign nations set their own standards for incorporation and governance, which often differ from those of New York or the United States. Extraterritorial application of New York law to foreign corporate governance disputes would infringe on the sovereign

rights of other nations and would invite retaliatory or protective actions against New York- and other U.S.-based companies.

This Court should affirm the First Department's well-reasoned decision, which is consistent with settled New York law.

ARGUMENT

I. THE COURTS BELOW PROPERLY HELD THAT, UNDER THE INTERNAL AFFAIRS DOCTRINE, SUBSTANTIVE FOREIGN LAW BARS APPELLANT'S CLAIMS.

A. Substantive Foreign Law Governs Appellant's Derivative Claims.

Under the internal affairs doctrine, the substantive laws of a company's state of incorporation govern "matters peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders—because otherwise a corporation could be faced with conflicting demands." *New Greenwich Litig. Tr., LLC* v. *Citco Fund Serv. (Europe) B.V.*, 145 A.D.3d 16, 22 (1st Dep't 2016) (emphasis and internal citation omitted).[2] The internal affairs

[2] *See, e.g., Diamond* v. *Oreamuno*, 24 N.Y.2d 494, 503-04 (1969) (the "primary source" of law governing "the duties and obligations of directors and officers and their relation to the corporation and its shareholders" is "that of the State which created the corporation"); *Zion* v. *Kurtz*, 50 N.Y.2d 92, 100 (1980) ("the generally accepted choice-of-law rule with respect to such 'internal affairs' as the relationship between shareholders and directors" is to apply the law of the state of incorporation). Other states have also long respected the internal affairs doctrine. *See, e.g., McDermott Inc.* v. *Lewis*, 531 A.2d 206, 216-17 & n.10 (Del. 1987) ("[I]n many leading cases the internal affairs doctrine was treated as axiomatic.").

doctrine "serves the vital need for a single, constant[,] and equal law to avoid the fragmentation of continuing, interdependent internal relationships." *Eccles*, 2024 WL 2331737, at *5 (alteration in original). "In addition to providing consistency to legal obligations, the internal affairs doctrine also protects the interests and expectations of shareholders by giving effect to their choice as to what jurisdiction's laws will govern the corporation's affairs." *Id*. Strict application of this doctrine is necessary because "[t]he corporation and its shareholders rightfully expect that the laws under which they have chosen to do business will be applied." *Hart* v. *Gen. Motors Corp.*, 129 A.D.2d 179, 185 (1st Dep't 1987). As this Court reaffirmed in *Eccles*, 2024 WL 2331737, at *1: "Consistent with New York's . . . approach to choice-of-law issues, we hold that, with rare exception, the substantive law of the place of incorporation applies to disputes involving the internal affairs of a corporation."[3]

[3] In *Eccles*, this Court "decline[d] to create any broad exceptions" "because of the important interests that the internal affairs doctrine represents." 2024 WL 2331737, at *7. The Court explained that, "in order to overcome this presumption and establish the applicability of New York law, a party must demonstrate both that (1) the interest of the place of incorporation is minimal—i.e., that the company has virtually no contact with the place of incorporation other than the fact of its incorporation, and (2) New York has a dominant interest in applying its own substantive law." *Id*. Neither of those two conditions is satisfied here, and this Court in no way suggested that the "rare exception" to the internal affairs doctrine was impacted by two 60-year-old statutes.

In Appellant's view, New York's Business Corporation Law silently abrogated the longstanding internal affairs doctrine and paved the way for the application of New York substantive corporate law to foreign companies doing business in New York. Unsurprisingly, New York has not taken that radical step. Appellant misreads Business Corporation Law §626 and §1319. Section 626 specifies the procedures for bringing a shareholder derivative action in New York courts. Section 1319 provides that certain provisions of the Business Corporation law, including §626, "to the extent provided therein, shall apply to a foreign corporation doing business in this state, its directors, officers and shareholders." Neither statute says anything about which substantive law governs questions of derivative standing. But Appellant claims that these two statutes—both enacted in 1961—silently overturned the internal affairs doctrine. Appellant's position ignores decades of precedent from this Court and other New York courts, which have routinely applied the internal affairs doctrine to derivative actions against foreign companies in the more than 60 years since the enactment of the Business Corporation Law. *See* Resp. Br. 14-15 (collecting cases).

In asking this Court to overturn this bedrock principle of corporate law, Appellant says that it is a mere "common-law . . . doctrine" that would mandate the application of an "antiquated requirement" of English law. Reply Br. 2-3. In advancing this extraordinary position, Appellant incorrectly says that Business

Corporation Law §1319 is a choice-of-law provision. *See* App. Br. 17-25. Not true. Neither the text nor the legislative history of §1319 suggests that it is a choice-of-law provision. In fact, courts and commentators have repeatedly confirmed that it is not. *See* Resp. Br. 16-25. If adopted, Appellant's interpretation of §1319 would reduce investor choice, unsettle market participants' expectations regarding applicable law, encourage forum shopping and duplicative litigation, and threaten New York's status as a global financial and business hub. *See infra* Section II.

B. Appellant Has Failed To Comply With the English Companies Act's Substantive Membership Requirement.

The nominal defendant in this case is incorporated in England. So under the internal affairs doctrine, substantive English corporate law governs Appellant's suit. The only remaining question is whether the membership requirement that the court below applied is a substantive provision of English law—and it is.

In *Davis* v. *Scottish Re Group Ltd.*, this Court examined Cayman Island Rule 12A and articulated a three-factor test to determine whether a foreign law is substantive or procedural. Those three factors are: (1) "the plain language of [the] rule," (2) whether the statute itself "creates a right," and (3) "general policy considerations." 30 N.Y.3d 247, 253-56 (2017). New York courts generally recognize other jurisdictions' pre-suit and standing requirements as substantive law. In fact, the pre-suit "demand requirement, which determines a shareholder's right to

prosecute the claim, is universally held to be a substantive requirement." *Cent. Laborers' Pension Fund* v. *Blankfein*, 111 A.D.3d 40, 47 (1st Dep't 2013). Application of the three *Davis* factors supports the conclusion that the same recognition should apply to the English Companies Act's membership requirement in this case, and more broadly to the pre-suit and standing requirements of other countries.

First, "the statutory text of the Companies Act does not support the conclusion that the membership requirement is merely a procedural rule limited to proceedings in U.K. courts." *City of Aventura Police Officers' Ret. Fund* v. *Arison*, 70 Misc. 3d 234, 250 (Sup. Ct., N.Y. Cnty. 2020). To try to fit a round peg in a square hole, Appellant asserts, without any analysis, that, because Section 260 states that Chapter I of the Companies Act "applies to proceedings in England and Wales or Northern Ireland," all of the rules in Chapter I are procedural. App. Br. 33-34. Even if this position might apply to certain truly procedural requirements in Chapter I, "it is far less persuasive when applied to the core provisions of Section 260" including "Section 260[3] [which] sets forth the basic claims for relief that can be asserted by a member in a derivative action, and against whom they can be made," and "the membership requirement" at issue here, both of which contain "limitations on derivative standing that have been found to be substantive." *Arison*, 70 Misc. 3d at 248. Thus, even though the judicial-permission requirement at issue in *Davis*

"was steeped in the idiosyncrasies of Cayman Islands procedure," the "requirement that the derivative plaintiff be a 'member' is not tied to unique procedural trappings of foreign courts." *Id*. at 249-50. In short, "New York . . . deems substantive anything that places an impediment upon either the right or the remedy," even if the substantive requirement is placed "within [the] procedural rules." *Lewis* v. *Dicker*, 118 Misc. 2d 28, 30-31 (Sup. Ct., Kings Cnty. 1982). The plain language of the English Companies Act's membership requirement confirms that it is a substantive rule.

Second, the requirement under the English Companies Act that a member of the company bring a derivative action "concerns the very nature and quality of [shareholders'] substantive right[s], powers and privileges as stockholders," which makes it a substantive requirement. *Arison*, 70 Misc. 3d at 251. In drawing the line between substantive and procedural laws, this Court has pointed to statutes of repose as laws that "exhibit a substantive texture" because they "practically block[] causes of action before they even accrue." *Tanges* v. *Heidelberg N. Am., Inc.*, 93 N.Y.2d 48, 56 (1999). By contrast, if a law "neither creates a right, nor defeats it," it is generally considered procedural. *Davis*, 30 N.Y.3d at 256.

Here, the Companies Act's membership requirement, unlike Cayman Island Rule 12A, *can* "negate a plaintiff's right to ever bring an action in court," *id*., because only a registered member has the right to bring a derivative action under

English law. R91-92 (Moore Aff. ¶ 32). By allowing only registered members of the corporation the right to seek permission from a court to prosecute a derivative action, the membership requirement "concerns the very nature and quality of their substantive right[s], powers and privileges as stockholders" thereby making it a substantive requirement. *Hausman* v. *Buckley*, 299 F.2d 696, 701 (2d Cir. 1962).

Third, general policy considerations and practical effects support classifying the membership requirement of the English Companies Act as substantive, because such a decision "imposes no additional burden on other courts, and at the same time discourages forum shopping."[4] *Arison*, 70 Misc. 3d at 253. This holding would also provide both management and shareholders with clear and definitive guidance regarding their rights and obligations when bringing and defending derivative lawsuits. *Id*.; *see also infra* Section II.A.

The imposition of New York law here would undermine the United Kingdom's decision to restrict the types of shareholders that may bring a derivative

[4] Appellant argues that "Defendants' speculation about forum-shopping is unfounded because, as a New York resident, Plaintiff is entitled to sue in New York courts." Reply Br. 27. But a plaintiff's choice of forum is never dispositive. For example, in shareholder derivative actions, such as this, "where there are hundreds of potential plaintiffs, all equally entitled voluntarily to invest themselves with the corporation's cause of action and all of whom could with equal show of right go into their many home courts, the claim of any one plaintiff that a forum is appropriate merely because it is his home forum is considerably weakened." *Koster* v. *(Am.) Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 524 (1947).

suit on behalf of a U.K. company, thereby imposing on U.K. companies, and their officers and directors, litigation costs that U.K. lawmakers sought to prevent. *See infra* Section II.D. Appellant's claim that "interpreting Chapter 1 as procedural [would not] implicate any policy concerns with respect to comity because it would impose no burden on any U.K. courts" ignores these vital interests. Reply Br. 27.

Based on the three-factor test articulated in *Davis*, the English Companies Act's membership requirement is a substantive precondition that must be satisfied to bring derivative claims on behalf of an English company. Appellant's failure to satisfy the membership requirement bars its claims.

II. ABANDONING OR WEAKENING THE INTERNAL AFFAIRS DOCTRINE WOULD UNDERMINE NEW YORK'S STATUS AS ONE OF THE WORLD'S FINANCIAL AND BUSINESS CAPITALS.

Beyond being correct as a matter of governing English law, the First Department's decision supports the long-recognized policies underlying the internal affairs doctrine. As this Court has explained, the internal affairs doctrine "serves the vital need for a single, constant and equal law to avoid the fragmentation of continuing, interdependent internal relationships." *Eccles*, 2024 WL 2331737, at *5 (alteration in original) (citation omitted). Eviscerating the internal affairs doctrine would "undermine the important interests of consistency and predictability that are critical to the internal affairs of a corporation." *Id.* at *7; *see Hart*, 129 A.D.2d at 184 (the "[u]niform treatment of directors, officers and shareholders . . . is an

important objective which can only be attained by having the rights and liabilities of those persons with respect to the corporation governed by a single law" (citation omitted)). *Amici*, their members, and their members' clients rely upon this consistency and predictability to do business in New York and contribute to the State's economy. As New York courts have long held, the interests of New York investors and New York State are best served by consistent application of the doctrine's strong presumption in favor of applying the law of the state of incorporation.

A. The Internal Affairs Doctrine Protects Shareholders' Voluntary Choice To Invest in Foreign Corporations Governed by Foreign Law.

Appellant is wrong in claiming that applying New York law to the business affairs of a foreign corporation is necessary to protect New York shareholders. *See, e.g.*, App. Br. 9. The opposite is true. The internal affairs doctrine protects shareholders by respecting their choice to invest in a corporation governed by a particular body of law. Upending this well-settled doctrine would disrupt important market functions and expose shareholders and corporations to inconsistency and unpredictability.

As this Court recently explained, "the internal affairs doctrine . . . protects the interests and expectations of shareholders by giving effect to their choice as to what jurisdiction's laws will govern the corporation's affairs." *Eccles*, 2024

WL 2331737, at *5. "In incorporating in a particular state, shareholders, for their own particular reasons, determine the body of law that will govern the internal affairs of the corporation and the conduct of their directors." *Hart*, 129 A.D.2d at 184. Later shareholders who purchase stock in a corporation similarly choose to invest with the knowledge that the corporate relationship will be governed by the law of a particular jurisdiction. *See* Frank H. Easterbrook, *The Race for the Bottom in Corporate Governance*, 95 Va. L. Rev. 685, 688 (2009) (internal affairs doctrine "serves investors' interest" by respecting their choice of where to invest). Thus, the internal affairs doctrine respects shareholders' voluntary choice and reasonable expectation.

This basic principle incentivizes corporations to incorporate in jurisdictions that shareholders prefer. "If managers pick a jurisdiction that allows them to exploit investors, then investors put their funds elsewhere." *Id.* The internal affairs doctrine is "vital" to this market dynamic. *Id.* ("Entrepreneurs and managers choose where to incorporate, and investors then choose whether and how much to chip in."). If investors do not know in advance that the corporate relationship will be governed by a particular legal regime, then there is no way for them to influence managers to incorporate in jurisdictions that will protect investors' interests.

Without consistent application of the internal affairs doctrine, corporations and their shareholders would be "faced with conflicting demands," as

each shareholder could try to impose varying bodies of law on the corporation, its directors, and officers, as well as on all other shareholders around the world. *Eccles*, 2024 WL 2331737, at *5. Appellant complains that under the internal affairs doctrine, New York shareholders who invest in foreign corporations may be required to "follow foreign procedural rules and petition foreign courts for permission to prosecute . . . derivative claims." Reply Br. 6. But that is only true if a New York-domiciled shareholder chooses to invest in a *foreign* corporation. Furthermore, derivative claims are by definition claims brought on behalf of the corporation, which is all the more reason to apply the law of the place of incorporation. In purporting to bring claims on behalf of an English corporation, Appellant can hardly complain when those claims are adjudicated under English law.

Without the internal affairs doctrine, shareholders, corporations, directors, and officers would face the risk of becoming subject to any body of law under which any shareholder might choose to bring a claim. This would put shareholders and corporations, as well as their directors and officers, in the untenable situation where "every state might seek to judge the same Board of Directors' decision under different public policy standards." *Hart*, 129 A.D.2d at 184. If New York and other jurisdictions no longer respect application of the law of the place of incorporation, even a New Yorker who specifically chose only to invest in New York corporations would not be protected: other shareholders from different states or

countries could bring a derivative claim under their home jurisdiction's law against a New York company.

B. Weakening the Internal Affairs Doctrine Would Burden New York Courts by Attracting Derivative Actions From Around the World.

If this Court sanctions the weakening of the internal affairs doctrine, New York would become an outlier, and our courts would face an influx of foreign derivative suits seeking to avoid perceived disadvantages under the law of their place of incorporation. The internal affairs doctrine is "regularly observed in the United States" and "generally obeyed" in Europe. Detlev F. Vagts, *Extraterritoriality and the Corporate Governance Law*, 97 Am. J. Int'l L. 289, 292 (2003) ("Departures [from the internal affairs doctrine] have been few and insignificant."). "In American corporation law, the internal affairs doctrine is a dominant and overarching choice of law principle," *Sagarra Inversiones, S.L.* v. *Cementos Portland Valderrivas, S.A.*, 34 A.3d 1074, 1081 (Del. 2011), and "an accepted part of the business landscape in this country," *CTS Corp.* v. *Dynamics Corp. of Am.*, 481 U.S. 69, 91 (1987). It is incorporated into the Restatement (Second) of Conflict of Laws § 302, and the American Bar Association's Model Business Corporation Act, enacted by 36 states.[5]

[5] Model Bus. Corp. Act § 15.01 (Apr. 5, 2024), https://tinyurl.com/nzkyc5nh; *see* Am. Bar Ass'n, *MCBA Enactments by State* (Nov. 13, 2023), https://tinyurl.com/bdhjccr7.

If New York permits plaintiffs and their counsel to evade this well-established doctrine, and to avoid the safeguards and standards that foreign countries impose in their corporate governance law, New York would attract opportunistic derivative suits from around the world.

In addition to the two cases pending before this Court, at least seven derivative suits have been filed in New York against foreign corporations in the past few years, many by the same plaintiff, and nearly all by the same plaintiffs' counsel, seeking to avoid the substantive legal requirements of their place of incorporation.[6] The lower courts have rightly dismissed these unprecedented lawsuits on various grounds, including lack of shareholder derivative standing under the relevant foreign law mandated by the internal affairs doctrine, *forum non conveniens*, and failure to comply with forum selection clauses in the corporations' articles of association.[7]

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[6] *Cattan* v. *Ermotti*, case nos. 652270/2020 (Sup. Ct., N.Y. Cnty.), 2022-02492, 2022-04653, 2022-04654 (1st Dep't) (UBS AG); *Cattan* v. *Vasella*, case nos. 650463/2021 (Sup. Ct., N.Y. Cnty.), 2022-04655 (1st Dep't) (Novartis AG); *Rosenfeld* v. *Achleitner*, case nos. 651578/2020 (Sup. Ct., N.Y. Cnty.), 2023-05018 (1st Dep't) (Deutsche Bank AG); *City of Philadelphia Bd. of Pensions & Retirement* v. *Winters*, case nos. 601438/2020 (Sup. Ct., Nassau Cnty.), 2022-01561 (2d Dep't) (Standard Chartered PLC); *Cattan* v. *Rohner*, case nos. 652468/2020 (Sup. Ct., N.Y. Cnty.), 2023-05695, 2023-05719 (1st Dep't) (Credit Suisse Group AG); *Willmann* v. *Smaghi*, case no. 605452/2020 (Sup. Ct., Nassau Cnty.) (Société Générale S.A.); *Lambinet* v. *Pötsch*, case no. 652830/2021 (Sup. Ct., N.Y. Cnty.) (Volkswagen AG).

[7] *See Cattan* v. *Ermotti*, 2021 WL 6200975 (Sup. Ct., N.Y. Cnty. Dec. 30, 2021) (UBS AG, forum selection clause); *Cattan* v. *Vasella*, 2022 WL 3574155 (Sup. Ct., N.Y. Cnty. Aug. 18, 2022) (Novartis AG, forum selection clause); *Rosenfeld* v.

This Court should not turn New York into a destination for foreign derivative suits seeking to avoid the law of their place of incorporation.

C. The Internal Affairs Doctrine Enhances New York's Attractiveness as a Hub for International Business and Finance and Headquarters for Multistate Corporations.

The consistent application of the internal affairs doctrine serves New York's position of one of the world's most important centers for international business and finance. *Amici*'s members value certainty, predictability, and uniformity when evaluating the legal regimes to which they may be subject—multistate and international corporations especially so, since they are most at risk of being subject to the potentially conflicting or inconsistent laws of multiple jurisdictions. This principle supports a key rationale for the internal affairs doctrine itself: "Only one [s]tate should have the authority to regulate a corporation's internal affairs . . . because otherwise a corporation could be faced with conflicting demands." *Eccles*, 2024 WL 2331737, at *5 (alteration in original).

Achleitner, No. 651578/2020, NYSCEF Doc. No. 236 (Sup. Ct., N.Y. Cnty. Mar. 30, 2023) (Deutsche Bank AG, lack of standing under German law and *forum non conveniens*); *City of Philadelphia Bd. of Pensions & Retirement* v. *Winters*, 2022 WL 20509490 (Sup. Ct., Nassau Cnty. Feb. 2, 2022) (Standard Chartered PLC, lack of standing under English law); *Cattan* v. *Rohner*, 2023 WL 2868337 (Sup. Ct., N.Y. Cnty. Apr. 10, 2023) (Credit Suisse Group AG, *forum non conveniens*). The derivative suit against Société Générale S.A. was voluntarily dismissed and the derivative suit against Volkswagen AG remains at the pleading stage.

The internal affairs doctrine allows cross-border companies to do significant business in New York, thus contributing to the State's economic lifeblood and longstanding position as a global financial center, while abiding by the corporate governance rules of their respective places of incorporation. Over 530 international companies, spanning 45 countries, are listed on the New York Stock Exchange. NYSE, *International Listings*, https://tinyurl.com/ypzn29k3 (last visited Oct. 27, 2024). "Since 2023, approximately 52% of IPOs on US exchanges have been from foreign-domiciled issuers, hitting a 20-year high." EY Global IPO Trends Q3 2024 (Sept. 25, 2024), https://tinyurl.com/bddtu762. New York has been, and will continue to be, well served by the predictability provided by the internal affairs doctrine, which enables the entry of non-U.S. companies to U.S. and New York capital markets.

Appellant suggests that the internal affairs doctrine should not apply in "an increasingly globalized world," App. Br. 9, but the opposite is true. As the U.S. Supreme Court has repeatedly explained: "The markets that facilitate th[e] national and international participation in ownership of corporations are essential for providing capital not only for new enterprises but also for established companies that need to expand their businesses. This beneficial free market system depends at its core upon the fact that a corporation—except in the rarest situations—is organized under, and governed by, the law of a single jurisdiction, traditionally the

corporate law of the State of its incorporation." *CTS Corp.*, 481 U.S. at 90. Thus, "[t]he expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts. . . . We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts." *M/S Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972).

There can be little doubt that permitting plaintiffs and their counsel to evade the internal affairs doctrine could impair the attractiveness and competitiveness of New York as a commercial and financial center. *Amici* believe that corporations will avoid doing business in New York if doing so risks the protections to which they are entitled under their home jurisdiction's law. In fact, global corporate insurance carrier Allianz identified the "surge" of "derivative law suits in New York State courts on behalf of shareholders of non-US companies" as one of the top five "mega trends companies should watch out for and guard against." Allianz, *Directors and Offices (D&O) Insurance Insights 2022*, https://tinyurl.com/2t8kzb4y (last visited Oct. 27, 2024). AIG likewise warned against "[t]he recent wave of New York derivative actions against [directors and officers] of foreign companies," stressing that these lawsuits "could present substantial and unexpected risks and challenges." AIG, *Shareholders Increasingly*

Targeting D&Os of Foreign Companies in New York Derivative Actions (Sept. 21, 2021), https://tinyurl.com/4nmr4jtx.

In a report commissioned by then-Mayor Michael Bloomberg and Senator Charles Schumer, New York already has observed this "threat to US and New York global financial services leadership." *Sustaining New York's and the US' Global Financial Services Leadership*, 10 (2006), https://tinyurl.com/4debe2zv. Mayor Bloomberg and Senator Schumer wrote that "the highly complex and fragmented nature of our legal system has led to a perception that penalties are arbitrary and unfair, a reputation that may be overblown, but nonetheless diminishes our attractiveness to international companies." *Id.* at ii. As the report found, foreign issuers have elected not to list their securities on U.S. exchanges precisely to avoid exposure to the U.S. legal system, causing a "substantial" economic impact to New York. *Id.* at 43-54.

D. Extraterritorial Application of New York Law to Foreign Corporations Would Infringe on International Comity.

The internal affairs doctrine also promotes international comity. *See Arison*, 70 Misc. 3d at 253. U.S. courts generally decline to apply U.S. law extraterritorially where doing so "creates a serious risk of interference with a foreign nation's ability independently to regulate its own commercial affairs." *F. Hoffman-La Roche Ltd.* v. *Empagran S.A.*, 542 U.S. 155, 165 (2004); *see, e.g.*, *Microsoft Corp.* v. *AT&T Corp.*, 550 U.S. 437, 455-56 (2007); *N.Y. Cent. R.R. Co.* v. *Chisholm*,

268 U.S. 29, 32 (1925) ("interference with the authority of another sovereign" is a matter the "other state concerned justly might resent"). The internal affairs doctrine follows that prudential approach to disputes implicating potential interference with a foreign nation's law.

When U.S. courts enmesh themselves in legal disputes that belong elsewhere, they offend sovereign governments and interfere with the United States' international policy priorities. As one commentator has stressed, "[t]he United States has offended the sovereignty of other countries" by "impos[ing] its regulations on [securities] transactions that may be viewed as essentially foreign." Jill E. Fisch, *Imprudent Power: Reconsidering U.S. Regulation of Foreign Tender Offers*, 87 Nw. U. L. Rev. 523, 523-24 (1993).

Some of the United States' closest allies have objected to the extraterritorial application of U.S. law to commercial disputes. *See, e.g.*, *Empagran*, 542 U.S. at 167-68 (discussing objections by Germany, Canada, and Japan to application of U.S. law to claims of "private foreign plaintiffs" when alleged "injuries were sustained in transactions entirely outside United States commerce"); *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 16-17, 21 (1963) (accounting for "vigorous protests from foreign governments," among other considerations, in ultimately holding that National Labor Relations Act should not apply to foreign-flag ships employing foreigners); *In re Westinghouse Elec.*

Corp., Uranium Contracts Litig., [1978] Eng. Rep. 434, 460 (H.L. 1977) (attempts by the U.S. to apply its laws extraterritorially are "not in accordance with international law").

International comity is a reciprocal doctrine, and extraterritorial application of U.S. law that results in overriding legitimate sovereign interests as expressed in foreign corporate law, for example, may trigger judicial and other forms of retaliation. *See McCulloch*, 372 U.S. at 21 (recognizing that infringements of foreign sovereignty caused by overbroad applications of U.S. law may "invite retaliatory action from other nations"). The extraterritorial application of U.S. procedural law could cause other countries to retaliate and to "seek[] to regulate activities of U.S. parties that impact their countries." Stephen J. Choi & Andrew T. Guzman, *Portable Reciprocity: Rethinking the International Reach of Securities Regulation*, 71 S. Cal. L. Rev. 903, 914 (1998). And there could be even broader implications: "An exorbitant jurisdictional assertion, or at least the appearance of it, can readily arouse foreign resentment, provoke diplomatic protests, trigger commercial or judicial retaliation, and threaten friendly relations in unrelated fields." Austen L. Parrish, *Sovereignty, Not Due Process: Personal Jurisdiction over Nonresident Alien Defendants*, 41 Wake Forest L. Rev. 1, 47 (2006) (internal quotations omitted); *see* Antonio F. Perez, *The International Recognition of Judgments: The Debate Between Private and Public Law Solutions*, 19 Berkeley J.

Int'l L. 44, 46 (2001) ("International tensions rise if foreign judgments are not recognized and domestic tensions rise if they are recognized in defiance of national values.").

* * *

The elimination of the protections of the internal affairs doctrine for foreign companies would contravene New York shareholders' voluntary investment choices, weaken New York's role as a global business center, burden New York courts with an influx of foreign disputes, and risk reciprocal treatment of New York and U.S. corporations abroad. Appellant offers no basis for upending this longstanding and important doctrine, which this Court recently reaffirmed, other than their desire to forum shop to New York courts. *See Eccles*, 2024 WL 2331737, at *1.

CONCLUSION

For the foregoing reasons, this Court should affirm the First Department's decision.

Dated: October 28, 2024
New York, New York

Respectfully submitted,

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WORD COUNT CERTIFICATION

Pursuant to Rule 500.13(c)(1) of the Rules of Practice of the Court of Appeals of the State of New York, I hereby certify that, according to the word count of the word-processing system used to prepare this brief, the total word count for all printed text in the body of the brief exclusive of the material omitted under Rule 500.13(c)(3), is 5,801 words.

Dated: October 28, 2024
New York, New York

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