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

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

New York Supreme Court

APPELLATE DIVISION — FIRST DEPARTMENT

Case No. 2022-04657

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

Plaintiff-Appellant,

against

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

(Caption Continued on the Reverse)

BRIEF FOR PLAINTIFF-APPELLANT

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Defendants-Respondents,

and

BARCLAYS PLC,

Nominal Defendant-Respondent.

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PRELIMINARY STATEMENT

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

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

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

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

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

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

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

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

of foreign corporations in New York courts.

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

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

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

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

QUESTIONS PRESENTED

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

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

STATEMENT OF THE CASE

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

A. Overview of This Shareholder Derivative Action

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II. The Relevant Facts as Alleged in the Verified Complaint

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

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

B. Barclays' Wrongdoing Under Defendants' Watch

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

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

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

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

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

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

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

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

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

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

R836–837 (¶197).

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

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

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

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

C. Barclays' New York Presence and Operations

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

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

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

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

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

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

III. The Lower Court's Order

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

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

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

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

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

STANDARD OF REVIEW

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

ARGUMENT

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

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

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

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

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

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

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

For over a century, the Court of Appeals has implemented this statutory scheme of the Legislature and applied New York law to cases involving foreign corporations, reasoning that they have consented to the application of New York law by doing business here. *See, e.g.*, *German-American Coffee*, 216 N.Y. at 64 ("[s]uch a statute … is in effect a condition on which the right to do business within the state depends"); *Pohlers v. Exeter Mfg. Co.*, 293 N.Y. 274, 280 (1944) (recognizing a foreign corporation's involuntary consent—"exacted by the state"—to be bound by New York law). Following the *German-American Coffee* line of cases, this Court applied §1319(a) in *Culligan* to a shareholder derivative action involving a foreign corporation and found as governing law §626's requirements for derivative standing. *See* 118 A.D.3d at 423. In so finding, this Court squarely held that the common-law internal-affairs doctrine must yield to §1319's statutory directive.

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

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

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

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

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

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

> **§626. Shareholders' derivative action brought in the right of the corporation to procure a judgment in its favor**

> (a) *An action may be brought in the right of a domestic or foreign corporation to procure a judgment in its favor*, by *a holder of shares* or of voting trust certificates *of the corporation or of a beneficial interest in such shares* or certificates. …

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

> **§1319. Applicability of other provisions**
>
> (a) In addition to articles 1 (Short title; definitions; application; certificates; miscellaneous) and 3 (Corporate name and service of process) and the other sections of article 13 (foreign corporations), *the following provisions*, to the extent provided therein, *shall apply to a foreign corporation doing business in this state, its directors, officers and shareholders*:
>
> …
>
> (2) *Section 626* (*Shareholders*' *derivative action brought in the right of the corporation to procure a judgment in its favor*).
>
> (3) Section 627 (Security for expenses in shareholders' derivative action brought in the right of the corporation to procure a judgment in its favor). …

N.Y. BUS. CORP. LAW §1319(a)(2)–(3).

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

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

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

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

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

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

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

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

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

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

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

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

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

Article 13
FOREIGN CORPORATIONS

General.

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

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

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

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

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

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

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

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

Id. at 63–65.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Philadelphia is therefore misplaced.

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

But, this rationale of denying that §1319 is "a conflict-of-law rule" cannot pass muster under settled rules of statutory construction. "Where the terms of a statute are clear and unambiguous, the court should construe it so as to give effect to the plain meaning of the words used." *Auerbach v. Bd. of Educ.*, 86 N.Y.2d 198, 204 (1995). To determine the legislative intent, "'all parts of a statute'" must "'be given effect'" and must be harmonized with each other, as well as with the general intent of the whole statute. *See Anonymous v. Molik*, 32 N.Y.3d 30, 37 (2018). And

effect and meaning must, if possible, be given to the entire statute and every part and word thereof. *Id*.; *see also* MCKINNEY'S CONSOL. LAWS OF N.Y., BOOK 1, STATUTES §§97–98 (1971).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

R1028; *see also* R786–787 (¶103).

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

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

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

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

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

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

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

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

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

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

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

* * *

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

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

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

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

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

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

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

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

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

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

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

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

companies specifically." *Id*. at 254.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

Dated: New York, New York
January 3, 2023

Respectfully submitted,
BOTTINI & BOTTINI, INC.

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Name of Typeface: Times New Roman

Point Size: 14 (body) and 12 (footnotes)

Line Spacing: Double

The total number of words in the brief, inclusive of point headings and footnotes and exclusive of the caption, table of contents, the table of authorities, the signature block, and printing specifications statement, is 13,566 words.

Dated: New York, New York
January 3, 2023

Respectfully submitted,
BOTTINI & BOTTINI, INC.

Albert Y. Chang

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STATEMENT PURSUANT TO CPLR 5531

New York Supreme Court

APPELLATE DIVISION — FIRST DEPARTMENT

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, 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 PADOVANI and BARCLAYS CAPITAL INC.,

Defendants-Respondents,

and

BARCLAYS PLC,

Nominal Defendant-Respondent.

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1. The index number of the case in the Court below is 656400/2020.
2. The full names of the original parties are set forth above. There has been no change to the caption.
3. The action was commenced in the Supreme Court, New York County.
4. The summons and complaint were served on January 11, 2021 and February 10, 2021. No answer has been filed.

5. The nature and object of the action: to recover damages and injunctive relief on behalf of nominal defendant Barclays PLC for the alleged breaches of fiduciary duties on the part of its officers and directors.
6. The appeal is from the Decision and Order of the Honorable Robert R. Reed, dated May 4, 2022.
7. This appeal is being perfected with the use of a fully reproduced Record on Appeal.

ADDENDUM A

GOVERNOR'S BILL JACKET

1961
CHAPTER 855

108 PAGES

NYLS added 3 pages

BUSINESS CORPORATION LAW

Revision

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We accept the following:

JOINT REPORT

OF

NEW YORK STATE BAR ASSOCIATION
Committee on Corporation Law

AND

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK
Committee on Corporate Law

ON

PROPOSED NEW YORK BUSINESS CORPORATION LAW
1961 SENATE INT. 522, ASSEMBLY INT. 885

INTRODUCTION

On March 22, 1956, the Legislature of the State of New York adopted a Resolution creating the Joint Legislative Committee to Study Revision of Corporation Laws. This action was taken as a result of recommendations to the executive and legislative branches of the state government by the Committee on Corporation Law of the New York State Bar Association and others.

After almost five years, there has been introduced in the current session of the Legislature a Bill representing the product of the Joint Legislative Committee's endeavors. The purpose of this Report, which is presented jointly by the Committee on Corporation Law of the New York State Bar Association and the Committee on Corporate Law of The Association of The Bar of the City of New York, is to comment on the Bill. The Bill was referred to in Governor Rockefeller's annual message to the Legislature on January 4, 1961 as "of major importance to our business climate".

The aim of this project was the modernization and simplification of the present outmoded and overcomplicated statutes, which have not been subject to a general revision for many years, and the elimination of unnecessarily onerous and cumbersome provisions which have burdened New York corporations and harmed the New York business climate. While the Bill embodies certain improvements over the existing corporate laws of New York, it falls short of the hopes of the members of the Bar who have been working on these matters. A great many of the suggestions made by the State and City Bar Committees have been disregarded, perhaps because the procedures adopted did not provide an adequate opportunity for exchanges of views between members of the practicing bar and the revisers' staff. In most cases, our Committees do not know why these recommendations were not adopted.

ARTICLE 1

SHORT TITLE; DEFINITIONS; APPLICATION; CERTIFICATES; MISCELLANEOUS

General.

This Article contains a combination of provisions derived from the introductory and concluding sections of the Model Act, together with various additional miscellaneous provisions, largely from the existing corporation laws, which are not paralleled in the Model Act.

§ 1.02 *Definitions.*

To a large extent the definitions are based on definitions in Section 2 of the Model Act and and are not contained in the existing corporation laws. In several instances the Model Act definitions have been altered, without improvement and actually with resulting defects. Several useful definitions in the Model Act have been omitted, namely definitions of "Shares", "Subscriber", "Shareholder" and "Authorized shares".

A definition of "Bonds" is included, of no recognizable origin, which defines the term to include bonds, debentures and notes "having a maturity date of more than a year after the date of their issue". This gives an artificial meaning to a well recognized term and, while doing so, eliminates short-term obligations for no apparent sound reason in the light of later provisions of the Bill, e.g., § 5.21 and § 5.22.

The Bill in general adopts accounting definitions from the Model Act, including the equity definition of insolvency. As hereinafter noted in respect of Article 5, this will import major undesirable changes into the New York law.

A change in the Model Act definition of "net assets" should be pointed out, since it is likely to invite litigation because of its effect on the right to pay dividends and other matters. The new definition is, in short, assets less "debts and similar liabilities". There is no indication as to what "similar" means.

The definition of "earned surplus" is taken in part from the Model Act, but omits express provision for elimination of a deficit, which makes the definition inconsistent with § 5.20 of the Bill, also taken from the Model Act. The definition also substitutes "net *realized* earnings, gains or profits, after deduction of all losses" for "net profits, income, gains and losses", which might have the effect of raising questions under the accrual basis of accounting. (Italics here and elsewhere supplied for emphasis.)

"Certificate of incorporation" is not adequately defined to encompass corresponding instruments of corporations formed under the varying laws of other jurisdictions.

ARTICLE 2

Corporate Purposes and Powers

§ 2.01 *Purposes.*

This basic substantive section of the Bill provides:

> "A corporation may be formed under this chapter for any lawful business purpose or purposes except to do in this state any business for which formation is *permitted* under any other statute of this state unless such statute permits formation under this chapter."

The word "permitted" in the foregoing provision should read "required" and the "unless" clause should be omitted. Various statutes of the state permit formation of certain types of corporations under such statutes, while the same types of corporations may also be formed under the present Stock Corporation Law, although such formation is not specifically permitted under the other statutes. The suggested changes would, we believe, be more consistent with the present law and not require consideration and possible amendment of other statutes.

Two separate bills have been introduced on behalf of the Joint Legislative Committee for amendment of this section. One bill (Senate Int. 939; Assembly Int. 1359) would amend the section to insert authority to form a corporation "for all lawful business purposes" and then to add the following to the section:

> "Where the certificate of incorporation states that the purposes of the corporation shall be all lawful business purposes, either alone or along with a specified purpose, or purposes, the purposes of the corporation shall be all lawful business purposes permitted corporations formed under this chapter except any business purpose requiring the consent of any public body or officer under this chapter or any other statute unless such business purpose is expressly set forth in the certificate of incorporation and the required consent is attached thereto."

Our Committees recommend adoption of this amendment. Several states now permit this. We believe that it is a sensible recognition of the actual effect of innumerable certificates of incorporation as presently drawn to encompass every conceivable purpose that the draftsman can dream up.

The second Bill (Senate Int. 962; Assembly Int. 1360) would further amend this section to provide that a corporation may be formed for any lawful business purpose or purposes "whether or not for profit". Some members of our Committees have urged such a provision and we would approve this amendment.

§ 2.02 *General Powers.*

This section is based on Section 4 of the Model Act, but the language has in a number of instances been altered without apparent improvement and with resulting

The definition of "stated value" is inadequate in the case of different series of shares of the same class, by providing that all shares of the same class shall have the same stated value.

§ 1.03 *Application.*

Since the existing corporation laws must continue in effect, at least for the time being, for the purpose of insurance, banking, railroad and other special corporations in New York, it is essential that the scope and applicability of the new Business Corporation Law be precisely defined. This is attempted, but not adequately accomplished, in this section.

§ 1.04 *Certificates; requirements, signing, filing, effectiveness.*

This section is useful in combining in one place various requirements which apply throughout the Bill. Paragraph (d) however, as to who shall sign a certificate, is not clear. It also perpetuates the requirement of notarization which has been eliminated in some forward-looking states and has been eliminated in our own state as to tax returns and for various other purposes. At least, a provision should be added to this section to eliminate the present requirement by the Department of State for authentication of all foreign notarizations of corporate instruments to be filed in the Department. We understand that New York stands almost alone in requiring this.

Under paragraph (f) of this section, an instrument becomes effective upon filing by the Department of State "Except as otherwise provided in this chapter". The Bill presently makes an exception to permit a delayed effective date of an instrument only in the case of mergers and consolidations. Our Committees have urged that delayed effective dates of amendatory certificates, and also of certificates of incorporation and certificates of dissolution, should be authorized. We can see no practical objection.

Paragraph (g) of this section retains the requirement that the Department of State certify and transmit a copy of every instrument to the clerk of the county in which the office of a domestic or foreign corporation is located in this state and that the county clerk file and index such copy. Our Committees consider this county filing of instruments obsolete in this day of rapid communication. There is no such requirement in the Model Act and many forward-looking states no longer require it. Its elimination would produce a tremendous saving to the state, both in current expense and in the long-term cost of preservation of duplicate records.

§ 1.08 *Notices dispensed with when delivery is prohibited.*

This section is taken from G. C. L. § 32. A new requirement has been added for no apparent reason, requiring that in lieu of proof of notice when dispensed with there must be set forth the name of every person not notified. This could be an unreasonable burden, especially in the case of publicly-held corporations.

defects. For example, in the introduction there has been inserted the limitation that each power thereafter granted to a corporation shall be "in furtherance of its corporate purposes". Thereafter in the section, however, it is provided that a corporation may make donations "irrespective of corporate benefit" or in time of war or national emergency may do any lawful business in aid thereof "notwithstanding its corporate purposes".

The section omits certain desirable general powers specified in the Model Act, such as a general power of indemnification of officers, directors and others. Since extensive limitations upon indemnification, at least of officers and directors, are specifically dealt with in Article 7, the omission of the general authority from Article 2 is improper. It also raises a question as to whether or not there is any authority to indemnify employees who are not officers or directors.

At this point it may be noted that § 9.08, in an irrelevant context, authorizes a corporation to give a guaranty "although not in furtherance of its corporate purposes", when authorized by a two-thirds stock vote. This provision should be transferred from Article 9 to Article 2.

§ 2.03 *Defense of ultra vires.*

This section, based on Section 6 of the Model Act, would, in effect, abolish the defense of ultra vires on behalf of a New York corporation. We approve the change, but the section requires some clarification in language.

ARTICLE 3

Corporate Name and Service of Process

§ 3.01 *Corporate name; general.*

This section retains the narrow restriction of the existing corporation laws which require a corporate name to contain the word "corporation", "incorporated" or "limited", or an abbreviation thereof. The Model Act and the vast majority of states allow a corporation to be designated also by the word "company". Furthermore, New York until 1911 recognized "company" as sufficient for both domestic and qualified foreign corporations, with the result that many older corporations now do business in this state with only such appellation.

We recommend that the more liberal Model Act provision be reinstated in the New York law. Further, the State of Connecticut, in recently adopting the Model Act, recognized that it should be sufficient for companies incorporated in other countries to qualify without the addition of an appellation other than that indicating corporate status in their home jurisdiction, such as "A.G." or "S.A.". Such a provision would seem particularly appropriate for a state concerned with encouraging international commercial transactions, such as New York.

This Article contains a general and salutary provision in § 3.03 for reservation of corporate names, but in § 3.01(a)(6) provides that where consent of the State Board of Standards and Appeals to the use of certain appellations is required (such as "labor union"), such consent must be obtained before the name may be reserved. This seems unnecessary and should only be required at the time of the filing of the certificate of incorporation or certificate of qualification, rather than at the time of reservation.

The provision of the Model Act that the name of a new corporation shall not be the same as the name of an existing corporation has been altered in this section to limit the prohibition to similarity with the name of an existing corporation "as such name appears on the index of names of existing domestic and authorized foreign corporations of any type or kind in the department of state, division of corporations". We are informed that this index is not complete. The fact that this change might simplify checking by the Division of Corporations, or limit its responsibility in this regard, would not seem a valid reason for a test which affords inadequate protection against formation of new corporations in contravention of the substantive rights of other existing corporations.

§ 3.02 *Corporate name; exceptions.*

This section contains certain exceptions to the restrictions on corporate names, but fails to include an exception to permit use of a similar name with the consent of the prior user. On the other hand, the same section permits a foreign corporation in certain cases and with approval of the Department of State to qualify under a name similar to that of a prior user without giving the latter an opportunity to be heard.

This section omits any provision corresponding to G. C. L. § 9-c, which permits an investment company to include "finance" or "bond" in its name with the approval of the Superintendent of Banks.

§ 3.03 *Reservation of name.*

This section is based upon Section 8 of the Model Act and in large part is an addition to the existing corporation laws. The Model Act provision, however, has been considerably revised and most of the changes are undesirable. For example, a provision has been added for issuance of a formal "certificate of reservation" which must later be filed with the certificate of incorporation or application for authority of a foreign corporation. This appears wholly unnecessary. No provision is made for a lost certificate. Also, extension of a reservation under the Bill is authorized only "for good cause shown by affidavit", which seems unwarranted and may create difficulties in the absence of any expressed standards.

Sections 9 and 10 of the Model Act contain provisions, not reflected in the Bill, whereby foreign corporations which are not doing business in the state, and there-

fore are not required to qualify, may register their names on an annual basis. This affords a simple procedure for the protection of corporate names by companies of national reputation and obviates the need for forming name-holding subsidiaries. A majority of our Committees favor the addition of such provisions in the Bill.

§§ 3.04 - 3.08 [*Service of Process*].

These sections are an example of numerous provisions in the Bill, some in great detail, on matters of civil procedure which obviously belong in the Civil Practice Act. A reason which has been given for not removing them from the existing corporation laws is that there has been a moratorium on amendments to the Civil Practice Act. However, the revision of that Act is pending in the Legislature so that the time is now appropriate to put these procedural provisions where they belong. This is especially so since the present Bill is not to take effect for two years.

Section 3.05 provides that, in addition to the mandatory designation of the Secretary of State for service of process, a corporation may designate an additional registered agent who may be "a natural person who is a resident of or has a business address in this state or a domestic corporation or authorized foreign corporation". This would permit a non-resident individual to act as such agent, although service of process upon him might be impracticable because of his non-residence. Further, since § 1.02(a)(4) defines "domestic corporation" as one organized or which could be organized under the new Business Corporation Law, the permission here granted would not extend to a New York corporation organized under another law, such as the Banking Law, even though it may have acted as statutory agent in New York for many years.

ARTICLE 4

Formation of Corporations

§ 4.01 *Incorporators.*

We see no reason why a corporation should not act as an incorporator and point out that in § 2.02(a)(16) the Bill would include the power to act as an incorporator as one of the general powers of New York business corporations. It would thus appear that business corporations organized in our state are to be granted a general power which they may exercise under the laws of some other state, if those laws so permit, while they cannot exercise the same power within New York. This attitude furnishes a striking contrast with that exhibited in Article 13 which imposes various and onerous restrictions on foreign corporations.

§ 4.02 *Certificate of incorporation; contents, filing.*

Reference is made to the discussion under § 2.01 concerning incorporation for "all lawful business purposes". We further note that while the lists of subscribers to shares and of initial directors have been dispensed with, which we approve, there has been added a requirement that the specific address of the office of the corporation be stated in the certificate. This is unnecessary. There is also required the specific address of any designated resident agent other than the Secretary of State and the specific address where the Secretary of State shall mail a copy of any process served upon him.

ARTICLE 5

Corporate Finance

General.

Essentially this Article represents a combination of provisions based on Sections 5, 14 through 22, 40 and 41 and 60 through 64 of the Model Act. The Article embodies the most far-reaching changes of the entire Bill in existing corporation laws. In substance, many of these provisions of the Model Act have been the most seriously questioned, and least accepted, provisions when that Act has been adopted by other states. The draftsmen of the Bill have recognized this and have not attempted to adopt to the fullest extent the provisions of the Model Act, but they still have gone far beyond the present law of this state.

While, as noted, most of the sections are based on sections of the Model Act, extensive language changes have been made apart from deliberate substantive changes, and the drafting changes, in the opinion of our Committees, have not been for the better. As a consequence, the Article raises serious problems, not only of the substance of the provisions, but of ambiguities and inconsistencies which we believe would for many years plague the practitioner and present questions which could only be resolved in the courts or by legislative clarification.

§ 5.01 *Authorized shares.*

Paragraph (a) of this section is based on the first paragraph of Section 14 of the Model Act, with extensive changes of language which are confusing, although not apparently intended to accomplish substantively different results. Essentially in the case of this paragraph we would recommend adherence more closely to the Model Act provision.

Authorization of special classes of stock should also be recognized, as is done in the Model Act provision and in certain other provisions of this Bill.

§ 5.02 *Issue of any class of preferred shares in series.*

This section is essentially based on Section 15 of the Model Act, but again with confusing variances in language. For example, the purpose of the section is to authorize the issuance of preferred shares in series, but the opening sentence of the Model Act provision has been so twisted that there is not in this section of the Bill any express statement that, if the certificate of incorporation so provides, a corporation may issue any class of preferred shares in series. It should also be noted that the Model Act authorizes issuance in series of both preferred shares and special classes of shares, which is desirable.

Contrary to the provisions of the Model Act which are reflected in this section, we believe that there should be no narrow delineation of the variations permissible between different series of the same class. Indeed, we see no reason to limit the power of a corporation, in accordance with its charter, to make whatever variations its business requirements dictate in different series of the same class of stock, except that the shares of all series of the same class should share ratably when stated dividends or amounts payable on liquidation are not paid in full, as presently required by S. C. L. § 11. The existing provision of S. C. L. § 11 also contains a limitation that the shares of all series of the same class having voting power shall not have more than one vote each, but we do not see any reason why this limitation is necessary. We believe that many large and small corporations will be greatly handicapped in their customary methods of financing through serial preferred stock issues, if the permissible variations between series are restricted as in this section.

§ 5.03 *Subscriptions for shares; time of payment, forfeiture for default.*

Paragraph (d) of the section provides that in case of default in paying any installment due on a subscription for shares, the shares and all previous payments made shall be forfeited to the corporation. This forfeiture provision, which is presently contained in S. C. L. § 68, is harsh. Section 16 of the Model Act appropriately provides that amounts realized on resale of any forfeited shares, in excess of the amount due on the subscription, must be returned to the defaulting subscriber. We believe the Model Act provision should be adopted.

§ 5.04 *Consideration and payment for shares.*

Paragraphs (g) and (h) of this section provide for withholding of the issue of certificates for shares until full payment has been received and further provide that the subscriber is entitled to all the rights and privileges of a shareholder "When the consideration for shares has been paid in full". This is not in accord with current New York law, which permits the issue of certificates for partly paid shares and the payment of dividends thereon. The existing law, particularly in connection with employees' stock purchase plans, is often desirable and should be retained. If eliminated, confusion could result, for example, under plans heretofore adopted under S. C. L. § 14.

§ 5.05 *Rights and options to purchase shares.*

Paragraph (d) of this section requires shareholder authorization for a "plan" for the issue of rights or options to officers, directors or employees, leaving ambiguous, as under the present S. C. L. § 14, the granting of rights or options on an individual basis without a formal plan. We believe that shareholder approval should be required in the case of the granting of rights or options to officers, directors or employees, whether or not there is a formal plan, and recommend that the matter be dealt with as in Section 18A of the Model Act, which is similar to § 5.05 except in this respect.

§ 5.06 *Determination of stated capital.*

This section is a modification of Section 19 of the Model Act. Among the problems dealt with is the question of what part of consideration for shares without par value shall constitute stated capital. The Model Act, recognizing the practicalities of the problem, permits the board of directors to make an allocation between stated capital and capital surplus within sixty days after issuance of shares. The Bill requires such allocation to be made "at the time of issue" which would present serious practical difficulties in many instances.

§ 5.07 *Compensation for formation, reorganization and financing.*

This section of the Bill adopts Section 20 of the Model Act but, without apparent reason, restricts payment, out of the consideration for an issuance of shares, to expenses for the sale or underwriting "by underwriters or dealers or others performing similar services". We see no reason to prevent payment, out of such consideration, of ordinary expenses, such as issue taxes, printing and legal fees, which may be incurred in a private issuance of securities without intervention of underwriters or dealers.

§ 5.08 *Certificates representing shares.*

This section contains in paragraph (c) a requirement for giving notice of existence of certain charter provisions on the face or back of every certificate for shares issued by a corporation. In general, we believe such requirements to be unnecessary and undesirable; shareholders do not generally look at certificates they receive after they have acquired shares for the purpose of ascertaining their rights.

§ 5.10 *Prohibited transfers to officers, directors, shareholders or creditors; laborers' wages preferred.*

It is strongly urged that this section be eliminated. It is derived in part from S. C. L. § 15, which came from an 1890 statute. The 1890 statute was never brought up-to-date to be integrated with the Uniform Fraudulent Conveyance Act which

was enacted in 1925 (Article 10—Debtor and Creditor Law). The protection of creditors is adequately covered in the Debtor and Creditor Law and in the Bankruptcy Act.

Apparently because the Uniform Fraudulent Conveyance Act and the Bankruptcy Act contain detailed provisions dealing with preferential transfers no provision similar to this section was thought necessary in the Model Act.

Paragraph (a) of this section is based on the definition of "insolvent" set forth in § 1.02. Paragraph (b) sets up another test for invalidity of transfer, and that statutory test varies from the test set forth in the Debtor and Creditor Law §§ 271-273.

Paragraph (e) of this section gives priority to laborers' wages. This paragraph is unnecessary because other laws ensure the same result. See comment to § 6.29, *infra*.

The Debtor and Creditor Law refers to every conveyance (defined to mean every payment of money, assignment, release, transfer, lease, mortgage, etc.). The Debtor and Creditor Law is broad enough to include a prohibited transfer to any person, including officers, directors and shareholders of a corporation. Therefore, there is no need for § 5.10.

§ 5.11 *Dividends in cash or property; partial liquidation.*

Paragraph (a) of this section makes several important changes in the New York law relating to corporate dividends, presently embodied in S. C. L. § 58 and Penal Law § 664:

(1) While the capital impairment test for legality of dividends is retained, the section adds a further restriction against payment of dividends which would leave the corporation "insolvent" in the equity sense. This is in accord with the Model Act. However, in view of the difficulty of applying the insolvency test, and the severe personal liability imposed by Article 7 of the Bill on directors for improper dividend payments (as well as for improper purchases of the corporation's own stock and in other respects), we note here particularly that there should be included in Article 7 the provision of Section 43 of the Model Act, not unlike the Delaware law, that exempts a director from liability if he relies and acts in good faith upon financial statements by independent public accountants or represented to be correct by certain corporate officers or if in good faith he considers assets to be of their book value.

(2) Special treatment of "wasting assets" corporations has been added in § 5.11(a)(1). Dividends may be paid in excess of surplus to the extent that the cost of the wasting assets has been recovered by depletion reserves, amortization or sale, if the net assets remaining are sufficient to cover the liquidation preferences of shares having preference on involuntary liquidation. However, unlike com-

parable provisions in, for example, the Model Act and the Delaware Corporation Law, the treatment is limited to corporations engaged "principally" in the exploitation of wasting assets. We see no reason for this limitation; furthermore, the term "principally" is imprecise and is likely to breed doubt and litigation.

(3) Dividends may be paid generally from any surplus, whether capital surplus or earned surplus, as under New York law today, but when a dividend is from sources other than earned surplus notice must be given to the shareholders disclosing the portion of the dividend charged to earned surplus and the portion charged to capital surplus. This is a provision new to the law of New York. The Bill requires like disclosures in other sections with respect to the surplus category from which funds come for purchases under certain circumstances of a corporation's own stock and with respect to the surplus accounts charged when a stock dividend is made, and with respect to transfers of surplus on *split-ups* and *reclassifications*. All this would of course require all New York corporations to maintain separate earned surplus and capital surplus accounts, even though the Bill permits dividends and stock purchases to be made freely out of either class of surplus. The problem is greatly aggravated by § 13.18, which in effect imposes the same requirement on all foreign corporations doing business in New York and having shareholders in New York. Many corporations maintain such separate accounts today; many more do not, and in the case of a large company with a long history we are advised by accountants that separating the accounts for past years will be a major task. Small corporations may find it even more difficult. Section 5.20(a)(1)(A) provides that a domestic corporation formed before the effective date of the Bill which has not previously determined the amount of its earned surplus may do so before the declaration of the first dividend after such effective date, and "such determination shall be conclusive in the absence of fraud", although there is no such provision in favor of a foreign corporation. Despite this provision and the fact that the Bill omits from § 5.20 much of the complex accounting principles of the 1960 Study Bill which were to apply to the computation of earned and capital surpluses, we believe that the disclosure requirement is not of sufficient importance to justify this change from the existing corporation laws. Publicly held corporations are already adequately regulated by stock exchange and S. E. C. rules, and the supposed advantages of the disclosure requirement are largely inapplicable to small and closely held corporations. The directors and officers of small corporations will probably in many cases fail to comply with the requirement simply by reason of unfamiliarity with it and will thereby be trapped into unintended violations and subjected to the severe and broad personal liability imposed by § 5.23.

Even if the underlying principle as to the distinction between earned surplus and capital surplus were acceptable, compliance with the disclosure requirement will often be impossible. Notice is to accompany the dividend or other distribution, setting forth the amount which comes other than from earned surplus. Not infre-

quently a corporation would be uncertain of the source of a distribution until after the close of the fiscal year and then only after its accountants had completed their audit.

Paragraph (b) of this section creates confusion by introducing the concept of "partial liquidation", which is not defined or explained elsewhere in the Bill.

§ 5.12 *Share distributions to shareholders.*

This section is completely new to the statutory law of New York. It provides that "A corporation may, from time to time, make a pro rata distribution of its authorized but unissued shares, or its reclassified or split-up shares, or its treasury shares, to holders of any class or classes of its outstanding shares" subject to five "conditions".

Before turning to the conditions we call attention to the fact that the section is premised on a basic misconception of the way in which the New York corporation law has always operated and will continue to operate under the revision. Stock dividends are, of course, actually "distributed" to the shareholders, just as cash dividends are distributed. On the other hand, a *reclassification* or *split-up* (or *combination* of shares into a lesser number, which is not mentioned) is legally accomplished by the filing of an amendment to the certificate of incorporation, after such amendment has been properly authorized by the stockholders. As soon as the filing takes place the stockholders automatically become the owners of the new shares, and their old certificates at once become evidence of such new ownership. Of course steps should be, and usually are, promptly taken to give the stockholders new *certificates,* appropriately describing the new shares, either in exchange for or in addition to, their old certificates, but such exchange of certificates or delivery of additional certificates is not necessary to make the stockholders the owners of the new shares. There is no "distribution" of the new shares in the ordinary sense.

The first condition is that shares of one class may not be distributed to holders of shares of any other class unless the certificate of incorporation so provides. Section 40 of the Model Act (which properly deals only with the distribution of dividends, and not split-ups, combinations or reclassifications) adds an alternative condition that the payment be authorized by a majority of the shares of the class in which the payment is made. We see no real need for either condition; a court of equity has adequate power to prevent misuse of the corporate power to make share distributions. In any event the application of the condition to reclassification is meaningless; a reclassification by its very nature changes shares of an existing class into shares of another class by amendment of the certificate of incorporation.

The second condition requires a transfer from surplus to stated capital in the event of the distribution of authorized but unissued shares "of an amount at least equal to that required by section 5.04." The reference to § 5.04 is inept. That section, which governs the consideration and payment for newly-issued shares, does not contain any fixed requirement as to amount other than that in the

case of par value shares the consideration shall not be less than the par value; in the case of par value shares the board may from time to time fix a higher consideration, and in the case of no par shares the board may (absent restrictions in the certificate of incorporation) fix the consideration "from time to time". Section 5.12 includes a proviso that "no transfers from surplus need be made upon a share *distribution following a reclassification* of shares by amendment of the certificate of incorporation, except to the extent that the aggregate par or stated value of the reclassified shares *so distributed* exceeds the stated capital for such shares prior to reclassification." For the reason given above this proviso is inappropriate. If any allocation of surplus should be required it would necessarily be made as a part of the reclassification and would not take place when certificates for the reclassified shares are later delivered.

The third "condition" is not a condition at all, but is expressed as an authorization to the corporation to split up treasury shares (while again nothing is said about combinations) or to reclassify treasury shares at the same time that outstanding shares are split or reclassified. This can be, and is, done by New York corporations today, and no specific authorization is necessary. If it were not done the treasury shares which were not so changed might constitute a separate class of shares—a most confusing and undesirable result. The third "condition" also contains an authorization to pay stock dividends on treasury shares, which is desirable. It is believed that this could be done without specific authorization, if it were not for the provisions of § 5.12, which only authorizes distributions on "outstanding" shares, thus excluding treasury shares as defined in § 1.02.

The fourth "condition" is also not a condition, but merely a statement that no transfer from surplus to stated capital need be made by a corporation making a distribution of its treasury shares to holders of any class of outstanding shares. It is an unnecessary accounting provision, and in any event is repeated and covered in § 5.18(c).

The fifth condition requires that "Every share *distribution* to shareholders, whether of authorized but unissued shares, or of split-up or reclassified shares, or of treasury shares, shall be accompanied by a written notice appropriately disclosing the effect of such distribution upon the stated capital and the earned surplus or capital surplus of the corporation." As pointed out above, in the case of a split-up or reclassification the change in the shares is effected by an amendment of the certificate of incorporation authorized by the stockholders, and any effect of the change on capital or surplus would normally be disclosed when that authorization is sought. In any event, however, as stated before, our Committees are opposed to such statutory disclosure requirements which make distinctions between earned and capital surplus compulsory.

We believe that all of § 5.12 is unnecessary and can be eliminated in its entirety. In any event the section should go no further than paragraphs (c), (d) and (e) of Section 40 of the Model Act.

§ 5.13 *Purchase by a corporation of its own shares out of surplus.*

This section adds to the restrictions now existing on the purchase of its own shares by a corporation (1) an "equitable insolvency" test and (2) a provision that no such purchase shall reduce net assets "below the aggregate amounts payable to the holders of shares having prior or equal preferential rights upon involuntary liquidation." This second restriction is inconsistent with provisions in the Bill which permit—properly, we think—the payment of dividends which reduce net assets below amounts necessary to satisfy preferential rights on involuntary liquidation, and which permit preference shares to be originally issued for less than such amounts. We do not think it is necessary or desirable to protect such preferences.

We note that the Bill adds the words "for any purpose" to the opening words of § 5.13 reading: "A corporation may purchase its own shares at any time and *for any purpose* when it is not insolvent * * *." These words did not appear in the 1960 Study Bill. We think that the phrase should be omitted because it could support the argument that there could be no purposes that would be improper—which is not the fact.

§ 5.14 *Purchase by a corporation of its own shares out of stated capital.*

This section permits a corporation to purchase its own shares out of capital in order to eliminate fractions, collect or compromise indebtedness to the corporation, pay shareholders entitled to receive payment for their shares under the chapter, and to effect "subject to the other provisions of this chapter" the retirement of redeemable shares by redemption or purchase. Generally speaking, these exceptions are all desirable. The last-quoted words presumably refer to § 5.17(a) where there is provision that: "No redemption or purchase of redeemable shares shall be made by a corporation out of its surplus or stated capital when such redemption or purchase would reduce the net assets below the aggregate amount payable to holders of shares having prior or equal preferential rights upon involuntary liquidation or below its stated capital after giving effect to the reduction required by paragraph (d) of section 5.18." Confusion and complexities result from the overlapping treatment of this subject in §§ 5.13, 5.14 and 5.17.

We further note that the Bill makes no attempt to extend to these sections dealing with the purchase by a corporation of its own shares the principle that there must be some kind of "disclosure" to the stockholders if the purchases or redemptions of stock are made from capital surplus rather than earned surplus. Disclosure is only required if the purchased shares are cancelled, and cancellation is only required if the purchase is out of stated capital. In that case § 5.18(d) requires disclosure of the effect on stated capital to be made "in the next financial statement furnished by the corporation to its shareholders [where it should be made regardless of the statutory requirement] and in the first notice of dividend

or share distribution that is furnished to shareholders between the date of the reduction of capital and the next financial statement". (Of course, neither the Bill nor the existing corporation laws require the periodic furnishing of any financial statements to shareholders.) We do not point out the inconsistencies in order to urge broader "disclosure" requirements such as those contained in § 5.11(a)(2) and § 5.12(a)(5). We expand on the subject only to show the inconsistencies and complications which the Bill fails to resolve in the process of introducing statutory "disclosure" requirements in an area not touched by the existing corporation laws.

§ 5.15 *Agreements for purchase of its own shares by a corporation.*

Paragraph (a) of this section provides: "A contractual promise by a corporation to purchase the shares of a shareholder shall be enforceable by the shareholder to the extent permitted by section 5.13 (Purchase by a corporation of its own shares out of surplus); except that, if the promise was made contemporaneously with the issue of the shares, it shall be so enforceable only if it was part of an agreement made in furtherance of the business of the corporation." The first part of this sentence removes doubt as to the enforceability of such contracts and is desirable. We do not, however, understand the "except" clause. If the promise is *not* contemporaneous with the issue of the shares is it to be enforceable although *not* made in furtherance of the business of the corporation? What does "in furtherance of the business of the corporation" mean as to a contract to purchase outstanding shares?

§ 5.16 *Redeemable shares.*

Paragraph (b) of this section provides that: "No redeemable or other shares shall be issued which purport by their terms to grant to any holder thereof the right to compel the corporation to redeem such shares" except in the case of open-end investment companies as defined in the Investment Company Act of 1940. At least, this exception is appropriate. A further exception in the 1960 Study Bill applicable to sinking funds has been omitted. This may have been done in response to a memorandum submitted by this Committee which criticized the detailed provisions which the 1960 Study Bill made applicable to sinking funds as being matters that should be regulated by the preferred stock provisions. We still believe that these previous detailed provisions should be eliminated, but it is important that the present language of paragraph (b) be expanded to include a simple exception which would permit a corporation to create sinking funds for the redemption or purchase of its preferred shares to the extent that surplus is available. This would be in accordance with frequent financial practice and would eliminate any doubt as to the continued validity of such provisions in existing issues.

§ 5.18 *Reacquired shares.*

We have mentioned in the discussion of § 5.14 the provision in § 5.18(d) requiring "disclosure" when stated capital has been reduced by the cancellation of reacquired shares. We object to this statutory provision as unnecessary. Regardless of any statutory mandate the necessary information should appear in all subsequent balance sheets of the corporation.

Paragraph (e) provides that shares cancelled under § 5.18 shall be restored to the status of authorized but unissued shares "except that if the certificate of incorporation prohibits the reissue of any shares required or permitted to be cancelled under this section, such shares shall be eliminated from the number of authorized shares by the filing of a certificate of amendment under section 8.05". This ignores the fact that certificates of this kind under § 8.05 must be authorized by the shareholders under § 8.03. Since it is mandatory that these shares be eliminated, we believe that such certificate need only be authorized by the board.

§ 5.19 *Reduction of stated capital in certain cases.*

This section permits a simplified procedure for reduction of capital in two cases: (1) elimination from stated capital of amounts previously transferred thereto from surplus, and (2) reduction of stated capital represented by no-par shares. It is based in general on Section 63 of the Model Act. However, it eliminates the requirement of shareholder authorization which was contained in the 1960 Study Bill and is also contained in the existing corporation laws of New York, the Model Act and, for example, the Delaware Corporation Law. A majority of our Committees think this requirement should be restored. If it is, the "disclosure" provision in paragraph (c) of course becomes unnecessary.

§ 5.20 *Special provisions relative to surplus and reserves.*

This section, together with certain of the definitions in § 1.02, is contained in the Bill chiefly because of the requirements in §§ 5.11(a)(2) and 5.12(a)(5), discussed above, that shareholders be furnished with information as to the effect of dividends on earned surplus and capital surplus. We are glad to note that much of the complex and confusing accounting provisions of the 1960 Study Bill have been eliminated. However, as stated above, we still believe that statutory distinctions between earned surplus and capital surplus are unnecessary and ill-advised innovations in the law, and that the so-called "disclosure" provisions are not required to protect shareholders of New York corporations. We therefore urge the elimination of a large part of this section.

In addition, we would eliminate paragraph (a)(3), which requires the consent of shareholders for the application of capital surplus to eliminate any deficit in the earned surplus. We do not believe that such consent should be necessary

in view of the fact that this is a mere accounting change which should be within the province of the board of directors.

§ 5.21 *Corporate bonds.*

Paragraph (a) of this section dealing with consideration for the issuance of bonds reflects existing provisions in S. C. L. § 69 and is appropriate, except that the definition of "bonds" in § 1.02 excludes notes with a maturity of not more than one year.

Paragraph (b) permits a corporation in its certificate of incorporation to confer upon holders of bonds "rights to inspect the corporate books and records and limited or contingent rights to vote in the election of directors, provided that, so long as the bonds are not in default, the holders thereof shall not have the power to elect more than one-third of the entire board". We do not see why the phrase "limited or contingent" is made applicable only to rights to vote and not to rights to inspect. As a matter of fact, however, the phrase appears inappropriate in either place. The grant of "rights to inspect" and of "rights to vote" would include, without more, lesser rights of the same kind which are subject to conditions or contingencies. We are more concerned by the language of the proviso. The bondholders would have the "power to elect" an entire board if the votes to which they were entitled constituted a majority of those present at an annual meeting, even though the total votes held by all bondholders might have been less than a majority of all votes that might have been cast. The "*power* to elect" cannot be effectively limited to a power to elect one-third or less of the entire board, except by specifically providing that the bondholders, voting alone, shall have the sole right to elect a stated number (not more than one-third) of the board. If stockholders and bondholders all vote together for the same candidates it will not be possible in most situations to know who was elected by the stockholders and who was elected by the bondholders. We believe that it is undesirable to provide for a specific class of directors who would be elected only by the bondholders, and urge that if bondholders are to be given voting rights it be done in the same manner as in the Delaware and Maryland Corporation Laws where they are given rights to vote in the same manner as stockholders. This leaves in the air, of course (as does § 5.21 (b)) the question of the size of the principal amount of bonds which a bondholder must hold for each vote cast by him, but this is not a serious defect.

§ 5.22 *Convertible shares and bonds.*

This section provides that securities convertible at the option of the corporation may not be issued, and prohibits "upstream" conversion in line with Section 14(e) of the Model Act. It contains a specific provision that a corporation may issue bonds convertible into other bonds, which seems superfluous.

Paragraph (d)(1) is badly drafted. It authorizes the corporation to issue bonds convertible into its shares upon terms fixed by the board of directors: "If the number of shares of each class outstanding plus the number of shares that the corporation may be obligated to issue to satisfy conversion privileges does not at any time while such conversion privileges are outstanding exceed the number of authorized shares of that class." In other words, the condition upon which the validity of the convertible bonds (or at least their conversion feature) depends may be broken after the issue of the convertible bonds has taken place. To avoid this any careful lawyer would always elect the alternative condition set forth in paragraph (d)(2), which requires inclusion of a provision in the certificate of incorporation (either originally or by amendment) conferring express authority on the board of directors. Thus the apparent intention of the Bill to make convertible bonds issuable by vote of the board of directors alone is indirectly defeated.

We object again to "disclosure" requirements in paragraph (f) in connection with conversions of convertible stock. Furthermore, we do not see why such "disclosure" should be required when stock is converted and not when bonds are converted.

§ 5.23 *Liability for failure to disclose required information.*

This section provides that the failure of a corporation to comply in good faith with the notice or disclosure requirements contained in various sections of the Bill referred to above "shall make the corporation liable for any direct or indirect damage sustained by any person in consequence thereof". If the disclosure requirements are eliminated, as we urge, this section would of course become unnecessary. If they are not eliminated we believe that the imposition of liability on the corporation is much too vague and indefinite. Very possibly the chance of such liability may not be great, but the damage (including "indirect damage", which is a unique term without any defined meaning as far as we know) could be tremendous. Certainly directors would not regard the risk as inconsequential, particularly since, if the corporation were held liable, stockholders might, in derivative actions, force the directors to make restitution. We know of no similar provision in any corporation law of any state.

The problem is greatly aggravated by § 13.18, which makes § 5.23 applicable to all foreign corporations doing business and having shareholders in New York.

ARTICLE 6

SHAREHOLDERS

§ 6.01 *By-laws.*

This section provides for amending by-laws by the vote of shareholders entitled to vote for directors and ignores the fact that there may be different classes of shareholders voting for some but not all of the directors. The section is not clear as to whether power to amend by-laws may be vested solely in the board of directors.

§ 6.03 *Special meeting for election of directors.*

The time periods set forth in this section may in some circumstances be insufficient, particularly in the case of corporations subject to S. E. C. proxy requirements. They should be extended.

§ 6.09 *Proxies.*

This section incorporates the provisions of the existing corporation laws as to circumstances under which proxies may be irrevocable. Section 6.20 of the Bill contains a new provision authorizing a binding agreement between two or more shareholders as to the exercise of voting rights, subject to specified limitations. To be consistent with this new provision and to make possible the implementation of such agreements, an additional category of authorized irrevocable proxies should be included in § 6.09.

Paragraph (g) of this section follows S. C. L. § 47-a in providing that a revocable proxy given by the seller of shares to the purchaser may be revoked after the contract of sale has been performed. In most contract of sale cases, that is just the time when continued effectiveness of the proxy is most important, particularly if a record date is involved. The provision should be changed.

§ 6.10 *Oath of shareholder.*

This continues existing corporation law provisions against giving anything of value for a proxy or vote. As noted in connection with § 6.09, this section also should be correlated with § 6.20. The two sections as presently drafted are inconsistent and incomplete. The simplest thing would be to do away entirely with the provision for shareholder oath-taking, which we believe is archaic and not required in most states.

§ 6.11 *Selection and duties of inspectors at shareholders' meetings.*

This section imports a new requirement that the number of inspectors must be "one or three", which seems unnecessary and contrary to the very common practice of using two inspectors.

§ 6.12 *Qualification of voters.*

Paragraph (c) of this section contains a peculiar requirement that shares held by a trustee may be voted by him only "after the shares have been transferred into his name as trustee". It hardly seems possible that it was intended to prevent trustees from ever obtaining proxies and voting shares held by their nominees.

§ 6.20 *Agreements as to voting; provision in certificate of incorporation as to control of directors.*

This section contains two major new provisions for New York law, one dealing with agreements between shareholders concerning their voting rights as such and the other dealing with limitations on the powers of directors in their management of the corporate affairs.

As to paragraph (b), it should be made clear that its purpose is limited to validating charter provisions which otherwise might be questioned as improperly limiting directors' power to manage the business. The wording of the Bill is such that the paragraph might be given a restrictive rather than a broadening effect and thus call into question many limitations on directors' powers which have long been accepted under case law or customary practice, such as restrictions on incurring debt and paying dividends, commonly found in preferred stock charter provisions.

Further, it appears that there is some inconsistency between paragraph (b) and § 6.01(b) which in general terms permits by-law restrictions on directors' powers, as also does § 2.02(a)(11). A further objection to paragraph (b) is that the limitations on directors therein permitted cannot, under the present language, be inserted in an original certificate of incorporation, since a shareholder vote is required to insert such limitations.

Paragraph (c) requires a two-thirds shareholder vote to eliminate director limitations provided in the charter pursuant to the foregoing paragraph. We see no need for the high vote requirement and suggest its elimination.

Paragraph (d) provides for shifting liability for managerial acts or omissions from directors to "the shareholders consenting thereto", where the directors' freedom has been limited under this section. We think that the imposition of shareholder liability might not be appropriate in all circumstances and that the description of the persons to be liable is too vague.

§ 6.24 *Books and records; right of inspection, prima facie evidence.*

Paragraph (e) provides for the mailing to a shareholder, upon written request, of the corporation's most recent balance sheet and profit and loss statement. We believe that the statements required to be furnished should be specifically described and appropriately limited. Thus, subject to a proviso requiring the furnishing of statements for the most recent fiscal year, if more recently publicized statements are not available, the corporation should be required to furnish only the balance sheet and profit and loss statement which were last furnished to shareholders generally or otherwise made available to the general public (e. g., by filing with the S. E. C. or other regulatory agencies). Otherwise, the corporation could be required to furnish to particular stockholders interim balance sheets and profit and loss statements prepared solely for the internal operating purposes of management. Since these are usually unaudited and always subject to year-end adjustment, they

could be misleading. There is also the possibility that particularly enterprising stockholders could use information so obtained to the detriment of other stockholders. Most important is the fact that such statements are prepared for operating purposes and disclosure would often prove contrary to the interests of the stockholders generally.

There should also be some limitation on the frequency with which a shareholder may demand such statements as are to be subjected to the requirement.

§ 6.27 *Security for expenses in shareholders' derivative action brought in the right of the corporation to procure a judgment in its favor.*

Toward the end of this section, there is a new provision conditioning recourse to the security for costs in a derivative action upon a finding by the court "that the action was brought without reasonable cause." This is not in the existing corporation laws, and the Model Act expressly provides for the recourse whether or not there is such a finding. The court's discretion in this important area should not be limited by the necessity of such a finding, and therefore the provision in the Bill should be deleted.

[§ 6.29 *Liability of shareholders for wages due to laborers, servants or employees.*]

While this section is not contained in the Bill itself, the Joint Legislative Committee has introduced a separate bill (Senate Int. 523, Print 523; Assembly Int. 837, Print 837) which would add this § 6.29, and also make a related change in § 6.24. The proposed § 6.29 is a compromise suggestion to retain in the New York law a slightly watered-down version of § 71 of the Stock Corporation Law. Our Committees have repeatedly pointed out that S. C. L. § 71, imposing personal liability on shareholders of New York corporations, is an anachronism. Corresponding provisions are today to be found in the laws of only a few other states. The provision makes it impossible for the careful practitioner to give an unqualified opinion that stock of a New York corporation is "fully paid and non-assessable."

The New York Debtor and Creditor Law, as well as the Federal Bankruptcy Act, properly give priority to wage earners' claims, and the New York Penal Law also contains provisions to protect wage earners against non-payment of their wages. As has been repeatedly documented, S. C. L. § 71 has in the past produced probably as great injustice upon smaller shareholders as could equal any misfortune of the persons it was designed to protect. Its existence in the New York corporation laws has been a prime reason for corporate counsel's selecting other jurisdictions for incorporation in order that they might assure their clients that stock of a corporation would be non-assessable. Our Committees strongly recommend that neither the proposed § 6.29, nor any provision based on the existing S. C. L. § 71, should be added to the new Business Corporation Law.

ARTICLE 7

DIRECTORS AND OFFICERS

General.

We feel that various changes are necessary from a standpoint of policy on important points covered by this Article. The faults that exist are largely those of concept rather than of drafting, although a number of technical improvements are required. The main topics for concern are the liability of officers and directors, conflicting interests of directors in transactions of the corporation and the indemnity provisions.

§ 7.02 *Number of Directors.*

References in this and other sections to by-laws "adopted by the shareholders" should be expanded to include by-laws adopted by the incorporators.

§ 7.06 *Removal of directors.*

We believe that the right to remove a director *for cause* should not be qualified, as in the Bill, simply because he may have been elected by cumulative voting or may represent one class of shares.

§ 7.07 *Quorum of directors.*

We believe it undesirable to permit one director to constitute a quorum (as one-third of a minimum three-man board) and would require a quorum of not less than two.

§ 7.08 *Action by the board.*

The City Committee recommends that directors should be permitted to act without a meeting by unanimous consent in writing, believing that the twelve states that permit such action are in the forefront and that the trend is toward such legislation. The omission of such a provision coupled with a statement of the Joint Legislative Committee in its Fourth Interim Report to the effect that the provision had been considered and rejected makes it less likely than ever that a New York court would sustain board action by unanimous written consent in any case where the question might be presented. The reason generally adduced for requiring a directors' meeting applies only where there is lack of unanimity among the board members. The arguments of a dissenting director should be heard by the other directors, of course, but where no director dissents there is no need for directors to confront each other in a meeting before taking any action.

A majority of the State Committee does not concur in the foregoing, believing that interchange of ideas is important in reaching decisions.

§ 7.11 *Notice of meetings of the board.*

Paragraph (d) of this section provides that, if a board meeting is adjourned, notice shall be given to directors not present at the time of adjournment "Unless otherwise provided in the by-laws". This is contrary to accepted practice and will simply be a trap for the average practicing lawyer. We believe that the requirement should be omitted and that no notice should be necessary in such a case unless required by the by-laws.

§ 7.12 *Executive committee and other committees.*

Paragraph (c) provides that the designation of any committee and delegation thereto of authority shall not relieve any director of any responsibility imposed upon him by law. The apparent intention of paragraph (c) is to impose liability upon a director who is not a member of a committee for action taken by the committee even if taken without the knowledge of the director or an opportunity for him to be heard thereon. We think the imposition of such liability is unwarranted and therefore recommend the elimination of this provision.

§ 7.13 *Interested directors.*

This section in paragraph (a) (2), and the succeeding section dealing with loans to directors, contain novel provisions which provide that approval of a contract or transaction with an interested director or authorization of a loan to a director shall be "by a vote sufficient for such purpose, without counting the vote or votes cast as a shareholder by such interested director or directors". We believe that the holders of a majority of the disinterested shares should be able to approve interested directors' contracts and loans to directors.

Paragraph (c) provides that the preceding paragraphs shall not relieve directors from responsibility. This is correct as to directors who are not interested and vote in favor of a contract or transaction, but it should not be true of the interested director who discloses his interest and does not vote on the contract or transaction. Paragraph (c) is not necessary and may be interpreted as placing greater responsibility on directors than is intended.

§ 7.19 *Liability of directors and officers in certain cases.*

A provision should be added to spell out what is presumed as to the assent of absent or silent directors, rather than imposing liability simply for "concurring" in corporate action. It should be expressly provided that a director who records his dissent is relieved of liability, and such provision should be general rather than limited to the special cases referred to in this section. Such a provision should probably be set forth as a part of § 7.17.

It should be made clear that no liability should be placed upon an officer for ministerial actions taken pursuant to a vote of the board.

In this section or in some other appropriate place in the Bill there should be inserted a provision as to both directors and officers similar to that found in Section 43 of the Model Act allowing directors to rely in good faith upon financial statements.

We believe that no personal liability should be imposed upon directors for transfers which constitute a preference in the face of insolvency. Small corporations, especially when in difficulty, often can obtain financing only by loans from directors or shareholders and this should not be discouraged. We know of only two other states which impose such a liability, and believe that the provisions of the Debtor and Creditor Law and of the Bankruptcy Act are sufficient.

§ 7.20 *Action against directors and officers for misconduct.*

We think that the actions set forth in this section are available without this provision and that it is unnecessary. No such provision appears in the Model Act. If allowed to stand, this section should be amended to state that this is not exclusive of other rights at law.

§§ 7.21 through 7.25 [*Indemnification*].

A number of issues of policy are raised in these sections. Although progress has been made in finding a solution to one of the troublesome and important problems under our corporate laws, the present Bill has not overcome the drafting problems presented by the complexity of the subject.

We have particular reference to a failure to distinguish in some situations (a) between derivative actions and actions in which the corporation is likely to be a real defendant, (b) between the proper indemnification of officers, as opposed to directors who are not officers, and (c) between civil and criminal liabilities. Each of these raises different considerations.

We are least satisfied with the provisions relating to the settlement of pending actions and to the attempt to regulate indemnification of officers and directors of foreign corporations. In some instances the mechanics of shareholder approval and the restrictions upon court discretion are also troublesome. Section 7.21 provides that nothing contained in Article 7 "shall affect the indemnification of corporate personnel other than directors and officers". This is inadequate in the absence of any general power of indemnification in Article 2. See our comment under § 2.02.

Sections 7.21 through 7.25 should be thoroughly reworked. The following basic results to be achieved are set forth to indicate the general nature of the changes we think necessary:

The provisions should cover all employees, which term should be defined to include directors as well as officers. Also, a provision should be added to the effect that nothing contained therein shall affect the right of a corporation to purchase insurance protecting its employees against claims of any kind.

Section 7.21 now provides that no indemnification shall be valid unless authorized by Article 7. This exclusivity provision may be acceptable in principle, if the succeeding provisions are couched in broad language, subject only to limitations therein stated. If the succeeding provisions are stated in terms of limited grants of authority, then the exclusivity provision of § 7.21 should be eliminated because no one can now have the foresight to write a limited grant of power which would be applicable in all situations where indemnification should be permitted.

Accordingly, it is suggested that §§ 7.22 and 7.23 permit indemnification in civil, criminal and administrative proceedings, subject, however, to the following limitations:

1. In the case of an action by or in the right of the corporation to procure a judgment in its favor (shareholders' derivative action), there shall be no indemnification of any sums which shall be adjudged in such action to be payable by the employee to the corporation because of negligence or misconduct in the performance of his duty to the corporation.

2. In the case of a criminal action or proceeding, there shall be no indemnification unless the employee acted for what in good faith he considered to be the best interests of the corporation and unless he acted in the scope of his employment or authority or in his capacity as a director.

3. Except pursuant to a court order under § 7.24, no indemnity shall be granted unless authorized, generally or in a specific case, by the certificate of incorporation, the by-laws, an agreement, or a resolution of directors or shareholders. Directors, in taking any action in respect of any indemnification, shall discharge their duty to the corporation as set forth in § 7.17 and shall act through a quorum of disinterested directors.

4. In the case of any settlement, no indemnification shall be had which would be inconsistent with any condition with respect to indemnification set forth in the settlement.

In addition, provision should be made which clearly permits a corporation to advance, as incurred, without any requirement of reimbursement, the current expenses of litigation.

If the various references to venue in other Articles of the Bill are retained, additions should be made to Article 7 providing for the venue of the various actions it creates.

ARTICLE 8

Amendments and Changes

§ 8.01 *Right to amend certificate of incorporation.*

This section provides that the certificate of incorporation, *as amended,* may contain only provisions which might, at the time of the amendment, be lawfully contained in an original certificate of incorporation. This means that whenever

an existing corporation requires an amendment of its certificate, the entire certificate will have to be reviewed and brought into line with existing law. Only the amendment should be required to contain currently authorized provisions.

§ 8.06 *Provisions as to certain proceedings.*

Paragraph (b)(3) of this section provides that no reduction of stated capital may be made unless, after the reduction, the stated capital exceeds the aggregate preferential amount payable upon all shares having preferential rights in assets upon involuntary liquidation, plus the par value of all other shares with par value. This is consistent with § 5.19 and also with the limitation of § 5.13 on purchase by a corporation of its shares out of surplus, but we previously pointed out the inconsistency between these provisions and the absence of similar restrictions on the original issuance of shares and on payment of dividends.

Paragraph (b)(6) of this section retains the appraisal rights now provided under S. C. L. § 38 (11). Our Committees recommend that such appraisal rights be eliminated. As a possible alternative, such appraisal rights might be retained as to existing corporations, but, at least as to corporations organized under the new law, provision should be made whereby these rights may be denied if the certificate of incorporation so provides.

§ 8.07 *Restated certificate of incorporation.*

This section should provide that the restated certificate need not include any statement not required in a certificate of incorporation filed at the time the restated certificate is filed. Otherwise, a restated certificate would have to perpetuate obsolete data concerning original subscribers and similar information.

ARTICLE 9

Merger or Consolidation; Guarantee; Disposition of Assets

General.

We note that the Bill omits the material formerly contained in § 9.08 of the 1960 Study Bill which specifically authorized mortgage and pledge of property by the board of directors without shareholder approval. While § 2.02(a)(5) of the Bill contains a general power to mortgage or pledge all or any part of the corporate property, we believe that it should be made clear that this can be done without stockholder approval, since this is a change from the existing corporation laws.

§ 9.04 *Certificate of merger or consolidation.*

Paragraph (b) of this section (and also paragraph (c) of the following section) requires a surviving or consolidated corporation to file a certified copy

of the certificate of merger or consolidation in the office of the clerk of each county in which the office of a constituent corporation, other than the surviving corporation, is located, and also in the office of the recording officer of each county in this state in which real property of a constituent corporation is situated. This is carried over from the existing corporation laws and is obviously intended to provide a record for title purposes. Nevertheless, it is unduly burdensome and does not effectively serve such purpose, since there is no requirement in the law that original certificates of incorporation or amendments thereof, particularly amendments which change the name of a corporation holding record title, need be filed with a recording officer in any county.

§ 9.08 *Guarantee authorized by shareholders.*

This section, which authorizes corporations to give guarantees, should be moved to Article 2. See our comments under § 2.02.

Further, the permission to give guarantees not in furtherance of corporate purposes seems to us too broad, despite the requirement of a two-thirds vote of shareholders. We believe that the power to give guarantees should be limited to those that are in furtherance of corporate purposes unless there is unanimous consent of shareholders thereto.

§ 9.09 *Sale, exchange or other disposition of assets.*

Paragraph (b) of this section provides for an automatic dissolution of a corporation in certain instances. Apart from the fact that dissolution should be covered in the dissolution articles, we do not see why dissolution should be required because of a sale of assets.

§ 9.10 *Right of shareholder to receive payment for shares upon merger, consolidation or sale, exchange or other disposition of assets.*

This section purports to grant appraisal rights in a variety of circumstances. Our Committees believe that appraisal rights should not be available in the case of a sale of all assets for cash where the cash is, pursuant to stockholder approval, to be distributed within one year from the sale, without regard to whether the sale is made to a corporation of the same name.

ARTICLE 10

Non-Judicial Dissolution

§ 10.03 *Certificate of dissolution; filing, effect, publication.*

This section perpetuates the provisions of the existing corporation laws as to the procedure upon filing a certificate of dissolution, inconsistent with the procedure upon filing other corporate certificates. Thus this section requires that one certifi-

cate of dissolution be filed on behalf of the corporation and thereupon the Department of State shall make and issue a second certificate "that such certificate of dissolution has been filed", and thereupon one of such second certificates shall be transmitted to the appropriate county clerk for filing and the other copy delivered to the corporation. We see no reason for this exceptional procedure. As in the case of all other corporate certificates which are filed, it should be sufficient to file one certificate and to have evidence thereof obtained by issuance by the Secretary of State of certified copies thereof.

The section further perpetuates the existing requirement for publication of the certificate of dissolution in the county in which the office of the corporation is located at the date of dissolution. This is generally a useless formality, since the place of publication is likely to bear little relation to the location of corporate creditors and shareholders. In fact, for practical business purposes, credit organizations and others that may be interested in the filing of a certificate of dissolution obtain their information regularly and currently from the filings in the Department of State in Albany. We recommend that the publication requirement be dispensed with.

§ 10.04 *Procedure after dissolution.*

This section requires a corporation, after dissolution, to use the words "in liquidation" after its name. A majority of our Committees believe that this would impose a needless burden on the corporation in settling its affairs. In the vast majority of instances of corporate dissolution, the matter of liquidation proceeds simply and expeditiously and should not be burdened with unnecessary paper work to change the corporate title on all papers during the short interval necessary for completing liquidation.

This section authorizes a dissolved corporation to sell its assets "for cash" or, after paying or adequately providing for its liabilities, the corporation, if authorized by a majority of the shareholders, may sell assets to other corporations for their securities, or partly for cash and partly for their securities. This could in many instances be too restrictive.

This section apparently also requires the consent of shareholders for the sale of even a small part of a corporation's assets, if sold to another corporation for securities. This is inconsistent with § 9.09 which requires shareholder approval only for the sale of all or substantially all the assets of a corporation and then only if the sale is not in the usual or regular course of business. Likewise, the right of appraisal should be provided only if a sale is of all or substantially all of the assets which the corporation has at the time of its dissolution. Here the section is inconsistent with § 9.10.

Paragraph (c) of this section inadequately provides for payment to the State Comptroller of assets distributable to creditors or shareholders who are unknown or cannot be found. No time is fixed when such sums shall be paid to the Comptroller.

§ 10.05 *Corporate action and survival of remedies after dissolution.*

Paragraph (a)(3) provides that shares may be transferred and determination of shareholders for any purpose may be made without fixing a record date until such time as it is fixed by the board of directors or the shareholders. This is unclear. It may mean that any fixing of a record, which might be for purposes of voting or a partial liquidating distribution, could result in an automatic closing of the stock records and a prohibition of subsequent transfers. The 1960 Study Bill gave the option of keeping the stock record open for transfer of shares or of closing the record books, which we believe desirable.

§ 10.07 *Jurisdiction of supreme court to supervise liquidation.*

Paragraph (a)(7) of this section refers to the appointment of a receiver under Article 12, which we hereafter recommend should be omitted from the Bill. If this is done, subparagraph (7) should be amplified to give the court general authority to appoint a receiver and to specify his powers.

ARTICLE 11

Judicial Dissolution

General.

This Article contains many procedural provisions which belong in the Civil Practice Act.

§ 11.01 *Attorney-general's action for judicial dissolution.*

This section provides for trial by jury as a matter of right. We question the wisdom of this provision in view of the wide discretion vested in the court. The Model Act does not provide for trial by jury in judicial dissolution.

§ 11.03 *Shareholders' petition for judicial dissolution.*

Paragraph (b) of this section authorizes the holders of 10% of outstanding shares entitled to vote, or a lesser proportion specified in the certificate of incorporation, to call a meeting of shareholders to vote on dissolution, with a proviso that such meeting may not be called more often than once in any period of 12 consecutive months. This paragraph, we believe, may invite harassment of a corporation by the calling of successive meetings to consider dissolution, notwithstanding that a large majority of shareholders may have previously voted against dissolution.

§ 11.14 *Preservation of assets; appointment of receiver.*

Reference is made to our recommendations under § 10.07 as to receivers.

§ 11.15 *Certain sales, transfers and judgments void.*

This section, in broadest terms, states that any transfer of property of a corporation, without prior court approval, after service upon the corporation of a summons or an order to show cause under this Article, shall be void to such extent as the court shall determine. This is unnecessarily broad and would appear to apply to even the payment of current wages and payment for current supplies.

ARTICLE 12

Receivership

General.

Our Committees have repeatedly urged that the provisions of Article 12, taken from the existing corporation laws, should not be included in the new Business Corporation Law. To the extent that revisions in these provisions are necessary, the Joint Legislative Committee should call them to the attention of those working on the revision of the Civil Practice Act. Detailed provisions regarding appointment and compensation of receivers, the oath of receivers, bonds of receivers and other matters embraced in Article 12 are contained in Sections 974-977-c of the Civil Practice Act and Civil Practice Rules 175-181. These provisions belong more appropriately in the Civil Practice Act and Rules than in a corporation statute.

The Article contains an anomaly from the existing corporation laws in apparently permitting, upon a mortgage foreclosure, appointment of a receiver of all the property of a corporation. This indicates a confusion with the appointment of a receiver of rents of mortgaged property, which is provided by § 254(10) of the Real Property Law. On the other hand, the Bill might permit the rents of the mortgaged property to be used for purposes other than pursuant to the mortgage.

Article 12 includes provisions which are overlapping and inconsistent with other provisions of the Bill as well as provisions of the Civil Practice Act. For example, Article 10 contains adequate and comprehensive provision for the filing, allowance and barring of claims. Article 12 sets forth an entirely different scheme for handling claims. The Bill as drafted makes Article 12 applicable to receivers appointed under Articles 10 and 11 and it would not be clear whether, when a receiver was appointed, the procedure as to claims set forth in § 12.07 should be followed or that in § 10.06.

ARTICLE 13

Foreign Corporations

General.

This Article we believe is particularly deficient in that it not only would continue the basic philosophy of existing New York law but would impose addi-

tional obligations and liabilities upon foreign corporations, their directors and stockholders, which go well beyond what other states see fit to do.

Instead of encouraging foreign corporations to come into this state and do business and qualify and pay taxes, the provisions of this Article we believe would actively discourage them, particularly the small ones, from coming in, or if they did, from qualifying. We believe that the approach of the Model Act, which has had so much consideration on the part of so many able and public-spirited people, and which has been adopted by so many states, is the correct one. That approach is basically to provide for qualification to do any business which similar domestic corporations are permitted to do; to eliminate as much as reasonably practicable the confusion over what is doing business requiring qualification, by setting forth certain activities which are not deemed to be doing business; to prohibit bringing an action in the courts of the state to enforce a contract made here unless qualified, but to permit such action after qualification; and to eschew any attempt to regulate the internal affairs of foreign corporations. Provisions like those in Article 13 of the Bill encourage retaliation in other states which can only hurt New Yorkers.

§ 13.01 *Authorization of foreign corporations.*

This section would be greatly improved if it followed the substance of Section 99 of the Model Act, including the specific list of activities therein contained which do not constitute transacting business in the state, eliminating, however, subdivision (e) of that section which makes "Effecting sales through independent contractors" an activity not constituting doing business.

This and succeeding sections should not, however, be cast in terms of applying for authority to transact business in the state. The generally accepted modern concept is that a foreign corporation "qualifies" to do business in a state. Thus, the law should provide for filing, and from time to time amending, a "certificate of qualification", corresponding to the filing (and amending) of a "certificate of incorporation" of a domestic corporation.

§ 13.07 *Tenure of real property.*

This section contains an archaic requirement that a foreign corporation may acquire and hold real property in the state (whether or not the corporation is required to qualify to transact business) "if the laws of the jurisdiction of its incorporation confer similar privileges on domestic corporations." This reciprocity requirement ill-advisedly makes the validity of title to New York real estate depend upon foreign law.

§ 13.12 *Contracts of unauthorized foreign corporations not enforceable.*

As previously noted in the general comments on this Article, we can see no reason from the standpoint of public interest for penalizing foreign corporations in the fashion of the existing corporation laws and as proposed in this section. It should be sufficient simply to provide that a foreign corporation transacting business in the state without qualification shall not maintain an action or proceeding in any court of the state until it shall have filed a certificate of qualification. Any further penalties should be a matter for the tax laws, if the foreign corporation, in fact, transacted business without having duly qualified and paid the appropriate New York franchise taxes.

§ 13.15 *Record of shareholders.*

Few, if any, other states require a foreign corporation qualifying to do business to maintain a record of shareholders within the state. The Model Act contains no such requirement. It is a burdensome requirement and its continuance may invite retaliation against New York corporations. It is one of those provisions that discourage qualification.

§ 13.16 *Voting trusts.*

For the same reasons stated under the preceding section, this provision for maintaining voting trust records in the state by foreign corporations should be eliminated.

§ 13.17 *Liabilities of directors and officers.*

Again, as in the case of the preceding sections, this is an extremely onerous and unnecessary section. The liabilities of directors and officers is a matter for the state of incorporation and it is neither appropriate nor good sense for New York to attempt to regulate the internal affairs of foreign corporations.

§ 13.18 *Liability of foreign corporations for failure to disclose required information.*

The same reasons previously stated apply to this section, which should be eliminated.

§ 13.19 *Applicability of other provisions.*

This section contains a detailed list of Articles and sections of the Bill which are made applicable to foreign corporations, the directors, officers and shareholders thereof. There is no such provision in the Model Act. The section is an attempt

to regulate the internal affairs of foreign corporations and we strongly recommend that it should be deleted in its entirety.

In many respects the proposed Business Corporation Law embodies improvements over the existing corporation laws of New York. With revisions along the lines indicated in this Report, we believe the Bill can be amended to merit the support of the Bar of this state.

January 25, 1961

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