
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,

(For Continuation of Caption See Inside Cover)

**Appellate
Case No.:
2022-04657**

BRIEF FOR DEFENDANTS-RESPONDENTS

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LAURA PADOVANI and BARCLAYS CAPITAL INC.,

Defendants-Respondents,

– and –

BARCLAYS PLC,

Nominal Defendant-Respondent.

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Did the Supreme Court of the State of New York, New York County, in its May 4, 2022, Decision and Order (the “Order”) granting defendants’ motion to dismiss the Complaint, correctly invoke New York’s internal-affairs doctrine to determine that substantive English law applies?

2. Did the Order correctly determine that plaintiff was not a member of Barclays PLC (and therefore lacked standing under English law) based on (i) counsel’s binding admission that plaintiff was not a member of Barclays PLC; and (ii) an unrebutted affirmation establishing that plaintiff did not appear on the Barclays PLC register of members?

3. Should the Complaint be dismissed, in whole or in part, on alternative grounds, including that (i) the trial court lacked subject-matter jurisdiction under [Business Corporation Law \(“BCL”\) §1319](#) because Barclays PLC was not “doing business” in New York; (ii) plaintiff failed to adequately plead compliance with both the ownership and pre-suit demand procedural requirements under applicable New York law, [BCL §626\(b\)-\(c\)](#); (iii) New York’s *forum non conveniens* doctrine compels dismissal in favor of an alternative forum; and (iv) plaintiff admits it alleges no wrongdoing by defendant Barclays Capital Inc. (“BCI”)?

Defendants respectfully submit that all questions should be answered in the affirmative, and the Order should be affirmed.

PRELIMINARY STATEMENT

In this purported shareholder derivative action, plaintiff seeks to bring English law claims on behalf of Barclays PLC—a U.K.-organized corporation—related to purported misconduct that occurred and caused injury in the U.K., with minimal, if any, connection to New York. Courts permit this type of extraordinary action only when the prospective derivative plaintiff satisfies a number of procedural and substantive requirements.¹ The trial court (Reed, J.) correctly dismissed the Complaint because plaintiff could not satisfy a fundamental hurdle—standing to bring these derivative claims.

Applying long-standing New York law, Justice Reed correctly invoked the internal-affairs doctrine to determine that English substantive law governed plaintiff’s derivative claims. (Record on Appeal (“R”) 44-48.) See [*Hart v. Gen. Motors Corp.*, 129 A.D.2d 179, 182-83 \(1st Dep’t 1987\)](#). With the benefit of unrebutted analysis of English law from defendants’ expert, Martin Moore KC (R83-716; R1138-1218), and relying on well-reasoned opinions—including [*City of Aventura Police Officers’ Retirement Fund v. Arison*, 70 Misc. 3d 234 \(Sup. Ct. N.Y.](#)

¹ This action is but one in a spate of recent derivative complaints by the same counsel (and often related plaintiff) brought against officers and directors of foreign financial institutions and companies. Time and time again, courts in this Department have recognized that these actions do not belong in this forum and have dismissed them. See [*Haussmann v. Baumann*, 73 Misc. 3d 1234\(A\), 2021 N.Y. Slip Op. 51232\(U\), at *4 \(Sup. Ct. N.Y. Cnty. 2021\)](#); [*Cattan v. Ermotti*, No. 652270/2020, 2021 WL 6200975, at *2 \(Sup. Ct. N.Y. Cnty. Dec. 30, 2021\)](#); [*Cattan v. Vasella*, No. 650463/2021, 2022 WL 3574155, at *7 \(Sup. Ct. N.Y. Cnty. Aug. 18, 2022\)](#).

[Cnty. 2020](#)), and [City of Philadelphia Board of Pensions & Retirement v. Winters](#), No. 601438/2020, slip op. (N.Y. Sup. Ct. Nassau Cnty. Feb. 3, 2022), NYSCEF No. [200](#) (R1240-52)—Justice Reed concluded that the U.K. Companies Act includes a substantive requirement that a derivative plaintiff must be a registered member of the corporation to have standing. (R45.) Here, plaintiff’s counsel admitted that plaintiff was not a member of Barclays PLC, and an unrebutted affirmation demonstrated the same. (R939-940; R719, ¶11.) Accordingly, Justice Reed correctly concluded that plaintiff was not a member of Barclays PLC and lacked standing to assert derivative claims. (R48.)

Both below and on appeal, plaintiff incorrectly claims that [BCL §1319](#) is a “choice-of-law provision” that displaced the internal-affairs doctrine in shareholder derivative actions on behalf of foreign corporations—and thus displaced the substantive law of the corporation’s home country with New York’s gatekeeping requirements. (Br. 25-30; 36-39.) The trial court correctly rejected this aberrant theory. The plain language of §1319 says nothing about choice-of-law and serves merely as a statutory predicate for subject-matter jurisdiction over shareholder derivative actions brought on behalf of foreign corporations doing business in New York. Lacking support from the text of §1319, plaintiff invokes so-called “legislative history” supposedly reflecting concerns that §1319 would impede the internal-affairs of foreign corporations. (Br. 29-30.) Yet plaintiff’s authority is not legislative history

at all, but a report prepared in opposition to a draft of the BCL by a special interest group—and later withdrawn. (Addendum A, at 211.)

Absent support from the statutory text or legislative history, plaintiff hangs its hat on an incorrect reading of [*Culligan Soft Water Co. v. Clayton Dubilier & Rice LLC*, 118 A.D.3d 422 \(1st Dep’t 2014\)](#). According to plaintiff, in *Culligan*, this Court—without saying so—overturned decades of precedent applying the internal-affairs doctrine in foreign shareholder derivative actions. (Br. 33.) That is not the law: In the nine years since *Culligan*, both the Court of Appeals and this Court have continued to apply the internal-affairs doctrine in foreign derivative actions. *See Davis v. Scottish Re Grp., Ltd.*, 138 A.D.3d 230, 233-34 (1st Dep’t 2016); *Davis v. Scottish Re Grp. Ltd.*, 30 N.Y.3d 247, 252-53 (2017); *In re Renren, Inc.*, 192 A.D.3d 539, 539 (1st Dep’t 2021). Indeed, just ten days before deciding *Culligan*, this Court applied the internal-affairs doctrine in a foreign derivative action. *See Lerner v. Prince*, 119 A.D.3d 122, 127-28 (1st Dep’t 2014). Plaintiff fails to grapple with this authority, which is both binding and fatal to its argument.

Finally, plaintiff resorts to attacking Justice Reed’s conclusions that: (1) the membership requirement is substantive, rather than procedural; and (2) plaintiff is not a member of Barclays PLC. (Br. 48-55.) But plaintiff failed to make many of its arguments below (and therefore waived them), and each is incorrect in any event. *See Recovery Consultants, Inc. v. Shih-Hsieh*, 141 A.D.2d 272, 276 (1st Dep’t 1988)

(“Nor, obviously, may a party argue on appeal a theory never presented to the court of original jurisdiction.”).

This Court can also affirm the dismissal of the Complaint on alternative, independent grounds (which Justice Reed did not reach after concluding that plaintiff lacked standing):

First, the trial court lacked subject-matter jurisdiction under §1319 because Barclays PLC was not properly alleged to be “doing business” in New York. A heightened standard of “doing business”—requiring that Barclays PLC’s activities in New York be “systematic and regular”—applies here, and plaintiff’s allegations as to Barclays PLC fall short. *See, e.g., [Commodity Ocean Transp. Corp. of N.Y. v. Royce](#), 221 A.D.2d 406, 406-07 (2d Dep’t 1995)* (subsidiary’s activities cannot be imputed to the parent).

Second, plaintiff did not satisfy [BCL §626\(b\)](#)’s continuous ownership requirement, which mandates that a derivative plaintiff own shares at the time of the challenged events and throughout the litigation. Here, plaintiff offered only the conclusory allegation that it held Barclays PLC shares at “relevant” times. (R750, ¶30; R905.)

Third, plaintiff conceded that it did not make a pre-suit demand required by [BCL §626\(c\)](#), and none of the three exceptions to this requirement apply. *See [Marx v. Akers](#), 88 N.Y.2d 189, 200-01 (1996)*.

Fourth, this is a textbook case for dismissal under *forum non conveniens*. This action is asserted on behalf of a company incorporated and headquartered in England, against primarily English directors and officers, based on alleged oversight failures occurring in England, and governed by English law. Moreover, plaintiff's argument that [CPLR 327\(b\)](#) and [GOL §5-1402](#) preclude *forum non conveniens* dismissal is: (1) unpreserved for this Court's review; (2) improperly based on material outside the Record on Appeal; and (3) meritless in any event because plaintiff relies on agreements from which this case does not arise and to which plaintiff is not a party.

Fifth, even if the Court rejected these independent bases to dismiss the entire Complaint, corporate defendant BCI should be dismissed because plaintiff pleaded no allegations against it.

COUNTERSTATEMENT OF THE CASE

A. Relevant Factual Background

Nominal defendant Barclays PLC is a foreign bank holding company under Section 8(a) of the International Banking Act of 1978, [12 U.S.C. §3106\(a\)](#). (R718, ¶4.) It is incorporated and headquartered in England and has its principal place of business and its only office there. (R718, ¶¶5, 9.) It owns no real estate, holds no leases, and has no employees in the United States. (*Id.* ¶¶7-8.) Instead, Barclays

PLC’s legally separate subsidiaries conduct business in the United States, including nonparty Barclays Bank PLC. (R723, ¶2.)

Plaintiff, a New York–registered corporation, purports to bring derivative claims on behalf of Barclays PLC—under English corporate law—against 46 individual defendants and Barclays PLC’s subsidiary BCI for allegedly breaching fiduciary duties to Barclays PLC. (R750, ¶30; R752-72, ¶¶36-81; R899-902, ¶¶314-32.) These alleged failures are a catalog of unrelated events, beginning in 2008 and spread over 12 years. Most individual defendants served as directors of Barclays PLC for only a portion (often nonoverlapping) of that period. (R80; R1131.) Twenty-four individual defendants reside in the U.K., and all but five reside outside New York. (R719, ¶13.)

Plaintiff alleges that it owns “Barclays common ordinary shares” as a result of a conversion of its American Depositary Receipts (“ADRs”) at some point in 2020. (R750, ¶30.) Although plaintiff states that its shares are “registered with Barclays,” it does not allege that it appears on Barclays PLC’s official register of members (*id.*), as required by the Companies Act to bring a derivative claim. (R91, ¶32.)

B. Procedural History

On May 14, 2021, BCI and certain individual defendants (the ones not challenging personal jurisdiction) moved to dismiss the Complaint. (R50-51.)

Defendants provided five independent bases for dismissal: (1) the trial court lacked subject-matter jurisdiction under §1319; (2) plaintiff lacked standing under English substantive law—applicable here under New York’s internal-affairs doctrine—because it was not a registered member of Barclays PLC; (3) plaintiff did not satisfy the ownership requirement of §626(b); (4) plaintiff did not allege facts sufficient to excuse the pre-suit demand requirement of §626(c); and (5) *forum non conveniens*. Defendants also argued that BCI should be dismissed and that claims accruing before April 5, 2014, were time-barred. (R78-81.)

In support, defendants submitted an affirmation from Barclays PLC Assistant Company Secretary Hannah Ellwood confirming, among other things, that plaintiff did not appear “as a registered, legal owner of Barclays PLC shares as of April 30, 2021,” on the official share register maintained by Equiniti Limited and Equiniti Financial Services Limited. (R719, ¶11.) Defendants also submitted an affirmation from Martin Moore KC, an English law expert, testifying to the requirements of English law governing shareholder derivative actions under both the Companies Act and common law. (R83-715.)

On July 27, 2021, plaintiff opposed defendants’ motion. (R919.) Notably, plaintiff did not mention or otherwise rebut the Ellwood Affirmation, let alone argue that the trial court should not consider it. (*Id.*) Nor did plaintiff submit any affirmation rebutting the English law principles set forth in the Moore Affirmation.

(*Id.*) On September 9, 2021, defendants filed their reply. (R1119.) Defendants submitted a second Moore Affirmation responding to commentary on English law in plaintiff’s opposition. (R1138-1218.)

Nearly six months later, plaintiff sought leave to file sur-reply, attempting to argue, for the first time, that [CPLR 327\(b\)](#) and [GOL §5-1402](#) precluded dismissal on *forum non conveniens* grounds. (R1253-59.) As exhibits, plaintiff attached certain agreements entered into by Barclays PLC or its subsidiaries. (R1266-1516.) The trial court denied leave to file the sur-reply and its exhibits. (R1540-41.)

Following oral argument, Justice Reed granted defendants’ motion to dismiss with prejudice after stating his reasoning on the record. (R44-48.) Relying on the persuasive analysis from two opinions dismissing derivative actions brought on behalf of English companies—[Arison, 70 Misc. 3d 234](#), and [Winters, No. 601438/2020](#) (R1240-52)—Justice Reed held that the BCL “does not override the internal affairs doctrine on the issue of standing to bring a derivative claim because it is a mere statutory predicate to jurisdiction.” (R45.) Justice Reed further rejected the argument that this Court’s decision in *Culligan* “dictates a different outcome,” because, as explained in *Arison*, “*Culligan* concerned regulation of conduct within New York and did not purport to alter settled New York law on the application of the internal affairs doctrine.” (R46.) Justice Reed also noted this Court’s precedent in [Lerner, 119 A.D.3d at 127-28](#), and the Court of Appeals’

decision in [Davis, 30 N.Y.3d at 252-53](#), which both applied the internal-affairs doctrine to foreign derivative actions. (R46-47.)

Having determined that substantive English law applies, Justice Reed held that “the membership requirement of the United Kingdom’s Companies Act is a substantive provision that . . . had to be met here” (R45), and that “Plaintiff lacks standing to sue” because it “is not a registered member of Barclays.” (R44.) Specifically, the court noted that: (1) “[t]here is an admission by attorneys in the course of their opposition that they could become a member which speaks plainly that they are not members”; and (2) “[t]here is an affidavit . . . searching the record of documents that would show who are or are not members.” (R44-45.) Consequently, Justice Reed rejected the “conclusory statement in the complaint” that plaintiff was “registered” and found that plaintiff lacked standing. (R45.) Justice Reed also concluded that, even if English common law applied instead of the Companies Act, as in *Winters*, none of the exceptions to the bar on derivative actions set forth in [Foss v. Harbottle, 2 Hare 461 \(1843\)](#), applied. (R46.) Justice Reed did not reach the merits of defendants’ other arguments in support of dismissal.

ARGUMENT

I. THE TRIAL COURT CORRECTLY HELD THAT PLAINTIFF LACKS STANDING UNDER ENGLISH LAW

A. The Trial Court Correctly Held That the Internal-Affairs Doctrine Mandates the Application of English Substantive Law

Consistent with the Order’s correct and straightforward application of New York’s internal-affairs doctrine, English law supplies the substantive prerequisites for this shareholder derivative action. “The internal affairs doctrine is a conflict of laws principle which recognizes that only one State should have the authority to regulate a corporation’s internal affairs—matters peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders—because otherwise a corporation could be faced with conflicting demands.” [*Edgar v. MITE Corp.*, 457 U.S. 624, 645 \(1982\)](#). Under this doctrine, “claims concerning the relationship between the corporation, its directors, and a shareholder are governed by the substantive law of the state or country of incorporation.” [*New Greenwich Litig. Tr., LLC v. Citco Fund Servs. \(Eur.\) B.V.*, 145 A.D.3d 16, 22 \(1st Dep’t 2016\)](#).

For nearly 60 years since the enactment of the BCL, New York courts—including the Court of Appeals and this Court—have applied the internal-affairs doctrine, and therefore the substantive law of a corporation’s place of incorporation, in derivative actions brought in New York on behalf of foreign corporations pursuant to §1319. See e.g., [*Hart*, 129 A.D.2d at 183](#); [*CPF Acq. Co. ex rel. Kagan. v. CPF*](#)

Acq. Co., 255 A.D.2d 200, 200 (1st Dep’t 1998); David Shaev Profit Sharing Acct. v. Cayne, 24 A.D.3d 154, 154 (1st Dep’t 2005); Sec. Police & Fire Pros. of Am. Ret. Fund v. Mack, 93 A.D.3d 562, 562-63 (1st Dep’t 2012); Siegel v. J.P. Morgan Chase & Co., 103 A.D.3d 598, 598-99 (1st Dep’t 2013); Cent. Laborers’ Pension Fund v. Blankfein, 111 A.D.3d 40, 45 n.8 (1st Dep’t 2013); Davis, 138 A.D.3d at 233-34; *see also* Greenspun v. Lindley, 36 N.Y.2d 473, 478 (1975); Davis, 30 N.Y.3d at 252-53.

B. The Trial Court Correctly Rejected Plaintiff’s Argument That §1319(a)(2) Displaced the Internal-Affairs Doctrine

Applying this well-settled New York law, the trial court correctly rejected plaintiff’s argument that §1319 is a “choice-of-law statute” that “displaces the internal-affairs doctrine” for foreign derivative suits. (Br. 33, 39.) None of plaintiff’s arguments with respect to either the text of the statute, the purported legislative history, or case law merit overturning the trial court’s correct decision.

1. §1319(a)(2) Is Not a Choice-of-Law Provision

Nothing in §1319(a)(2)’s text or legislative history mandates the application of New York law. Section 1319 does not purport to dictate or limit what law applies to foreign shareholder derivative actions, nor is it expressly identified as a choice-of-law provision. Instead, it provides only that “the following provisions, to the extent provided therein, shall apply to a foreign corporation doing business in this state, its directors, officers and shareholders,” including §626, BCL §1319(a)(2),

which provides statutory authority for derivative suits. The absence of clear (or indeed any) textual indication that §1319 is a choice-of-law provision should end the inquiry. “Statutes that are expressly directed to choice of law . . . rather than the local law of another state, are comparatively few in number,” Restatement (Second) of Conflict of Laws §6 cmt. a (Am L. Inst. 1971), such that a “court will rarely find that a question of choice of law is explicitly covered by statute.” *Id.* §6 cmt. b. For example, an express “statutory choice-of-law provision” is one providing “the law of the jurisdiction” that applies to wills. [*Ministers & Missionaries Benefit Bd. v. Snow*, 26 N.Y.3d 466, 470-71 \(2015\)](#) (quoting [*N.Y. Est. Powers & Trusts Law §3-5.1\(b\)\(2\)*](#)).

Not surprisingly then, commentators have unanimously explained that “BCL §1319 . . . is not a conflict of laws rule and does not compel the application of New York domestic law. Rather, it is the statutory predicate allowing New York to follow its conflict of laws rules in determining the applicable law.” 3 Christopher M. Potash et al., *White, New York Business Entities* ¶B1319.01 (14th Ed. 2022); *see also* 14 N.Y. Jur. 2d *Business Relationships* §3 n.5 (2018); 20 *Carmody-Wait 2d* §121:166 (2022); *New York Practice Series, Commercial Litigation in New York State Courts* §15:7 (Robert L. Haig, ed.-in-chief, 5th ed. 2020).

Plaintiff’s claim that §1319(a)(2) mandates the application of §626(a)’s standing requirements in place of foreign substantive standing requirements fares no

better. Section 626(a) sets forth the basis for subject-matter jurisdiction by New York courts over shareholder derivative actions and the minimum standing requirements for a shareholder to maintain that action in New York: “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.” [BCL §626\(a\)](#) (emphasis added). Nothing in §626(a) relates to choice-of-law issues or indicates that additional standing requirements beyond New York’s baseline standards are not applicable to foreign derivative suits.

Finally, plaintiff’s argument that §1319 must be read as a choice-of-law provision because it has “no other purpose” (Br. 36-37) fails for two reasons. First, Article 13 has an independent purpose: it was designed to place all provisions of the BCL that impacted foreign corporations into one article. *See* Warren M. Anderson & Robert S. Leshner, *The New Business Corporation Law – Part II*, 33 N.Y. St. B.J. 428, 432 (1961) (“A novel approach has been taken in [Article 13] in that all provisions of the new law controlling foreign corporations are assembled in this Article either in full or by express cross reference.”). Likewise, legislative history confirms that the purpose of §1319 was only to “enumerate[] the sections of the other provisions of this chapter which apply to foreign corporations generally and to domiciled foreign corporations.” Joint Legislative Committee to Study Revision of

Corporation Laws, Explanatory Memorandum on Business Corporation Law (Mar. 13, 1961) (Addendum A, at 281.) In other words, §1319(a)(2) makes clear, in the article collecting all provisions that impact foreign corporations, that the grant of subject-matter jurisdiction in §626(a) may be extended to foreign corporations. Second, §1319(a)(2) imposes an important limitation on the jurisdiction over foreign derivative actions that is not contained in §626(a)—it only extends to corporations “doing business” in New York. (*See infra* §II.A.)

2. Plaintiff’s “Legislative History” Does Not Demonstrate That §1319(a)(2) Is a Choice-of-Law Provision

Although the Court’s inquiry could end with the text, so-called “legislative history” does not advance plaintiff’s claim that §§1319 and 626 supplant the internal-affairs doctrine. (Br. 27-31.) To begin, plaintiff mischaracterizes an “objection of the corporate establishment, represented by the State and New York City Bar Associations” (“Bar Report”) as “legislative history.” (Br. 29.) It is not. Moreover, plaintiff failed to include the cover letter submitting the Bar Report to the governor’s office that includes a handwritten notation stating “opposition later withdrawn.” (Addendum A, at 211.)²

² In any event, the Bar Report was not directed at the final statute. Indeed, another page of the Bar Report also omitted by plaintiff reveals that the authors intended to provide proposed revisions to the draft BCL. (Addendum A, at 213.) And the New York State Legislative Annual explains that the draft BCL was amended based on the “criticisms and suggestions set forth in the Bar Report.” (*Id.* at 297.)

In any event, the Bar Report does not advance plaintiff's case. Although the Bar Report expressed a concern that a draft version of the BCL was "an attempt to regulate the internal affairs of foreign corporations," there is no indication that its concern had anything to do with choice of law.³ As plaintiff recognizes (Br. 38), the internal-affairs doctrine was once considered a "jurisdictional" issue. [*Broida v. Bancroft*, 103 A.D.2d 88, 90 \(2d Dep't 1984\)](#); see also [*Cohn v. Mishkoff-Costello Co.*, 256 N.Y. 102, 105 \(1931\)](#). As a result, prior to the BCL's enactment, New York courts would decline subject-matter jurisdiction over derivative actions brought on behalf of foreign corporations for fear of interfering with the internal affairs of the corporation. See [*Broida*, 103 A.D.2d at 90](#). By expressly providing for jurisdiction over certain foreign derivative actions, §1319(a)(2) eliminated the jurisdictional conception of the internal-affairs doctrine still applied by some courts. See [*Adolph Meyer, Inc. v. Florists' Tel. Delivery Ass'n*, 36 Misc. 2d 566, 567 \(Sup. Ct. Queens Cnty. 1962\)](#).⁴

³ Tellingly, the Bar Report does not indicate which parts of §1319 were believed to be "an attempt to regulate the internal affairs of foreign corporations." (Addendum A, at 245-46.) Plaintiff makes a passing reference to [BCL §1317](#) when discussing the Bar Report (Br. 29 n.13), but that provision is irrelevant here. The Complaint is clear that this action is brought under §1319. (R773, ¶83.) Nor did plaintiff invoke §1317 in its briefing below. (R931.) Any attempt to rely on §1317 is therefore waived. See [*Copp v. Ramirez*, 62 A.D.3d 23, 31 \(1st Dep't 2009\)](#). Regardless, §1319 does not contain any language similar to §1317(b), which provides "[a]ny liability . . . 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." [BCL §1317\(b\)](#).

⁴ Bereft of textual support or actual legislative history, plaintiff mischaracterizes a series of articles to support its claim that §1319 should be considered a choice-of-law provision. (Br. 37-38.) None
(cont'd)

3. *Culligan* Did Not Overturn Decades of Precedent Applying the Internal-Affairs Doctrine to Foreign Derivative Claims

Plaintiff's remaining argument that §1319 is a choice-of-law provision rests almost entirely on a misinterpretation of this Court's decision in *Culligan*. According to plaintiff, *Culligan* overturned decades of settled precedent and expectations applying the internal-affairs doctrine in shareholder derivative actions brought on behalf of foreign corporations, and the trial court improperly declined to follow this purportedly binding precedent.⁵ (Br. 33-35.) But *Culligan* does not bear the weight plaintiff assigns it, and the trial court correctly reasoned that *Culligan* "did not purport to alter settled New York law on the application of the internal affairs doctrine." (R46); [Arison, 70 Misc. 3d at 245 n.3](#).

of these articles address the choice of law to be applied to foreign derivative actions brought under §1319. For example, Professor DeMott noted that New York law may apply under Article 13 to "specified internal affairs questions," such as "provisions granting inspection rights to shareholders," but did not mention §1319. Deborah A. DeMott, *Perspectives on Choice of Law for Corporate Internal Affairs*, 48 Law & Contemp. Probs. 161, 164 & n.17-24 (1985). Likewise, as Professor Kessler noted, the BCL "attempt[ed]" to "subject[] foreign corporations to the same standards as local corporations" "to some extent" "in a number of areas." Robert A. Kessler, *The New York Business Corporation Law*, 36 St. John's L. Rev. 1, 107 n.418 (1961). But nowhere does the article suggest that §1319 is one of those areas. Finally, although plaintiff asserts that Professor Stevens' article indicates that objections to the application of New York regulations to foreign corporations were "[c]ast[] aside," (Br. 31), in fact, the article states that "[t]he new law has been drafted with the acceptance of the[] distinctions" between the reasons for and against applying New York law to foreign corporations. Robert S. Stevens, *New York Business Corporation Law of 1961*, 47 Cornell L.Q. 141, 172-73 (1962).

⁵ Plaintiff also argued below that *Culligan* separately held that the internal-affairs doctrine applies only to current officers and directors, not former officers and directors like many of the defendants here. (R23-24.) Like the trial court (R47), this Court has rejected that interpretation. See [Eccles v. Shamrock Cap. Advisors, LLC, 209 A.D.3d 486, 487-88 \(1st Dep't 2022\)](#).

Critically, as the trial court and *Arison* recognized, “[p]laintiff’s argument ‘is contrary to decades of controlling appellate precedent.’” [Arison, 70 Misc. 3d at 244-245](#) (citation omitted); (R47). This precedent has continued unabated since *Culligan*. In [Davis](#) (decided two years after *Culligan*), this Court applied the internal-affairs doctrine and held that derivative claims brought on behalf of a Cayman nominal-defendant were correctly dismissed under Cayman law.⁶ [138 A.D.3d at 233-34, 238-39](#). The Court of Appeals too applied the internal-affairs doctrine, reversing only because it concluded that the Cayman rule at issue was procedural—not because the internal-affairs doctrine was inapplicable. See [Davis, 30 N.Y.3d at 250](#). Similarly, in [In re Renren, Inc., 192 A.D.3d 539, 539 \(1st Dep’t 2021\)](#), this Court affirmed the application of Cayman law under the internal-affairs doctrine.⁷

⁶ Plaintiff cannot distinguish *Davis*, but speculates that the parties “agreed that the internal-affairs doctrine applied,” and disputed only whether the applicable Cayman rule was substantive or procedural. (Br. 49 n.17.) There is no basis to believe that binding recent precedent escaped the attention of both this Court and the well-counseled parties before it.

⁷ Plaintiff relies on [German-American Coffee Co. v. Diehl, 216 N.Y. 57 \(1915\)](#) to argue that corporations doing business in New York consent to the application of New York law (Br. 32), but that case is inapposite. In [Diehl](#), the Court of Appeals applied New York law because the statutory provision at issue provided that “officers, directors and stockholders of a foreign stock corporation transacting business in this state . . . shall be liable under the provisions of this chapter, in the same manner and to the same extent as the officers, directors and stockholders of a domestic corporation.” [Id. at 62](#) (emphasis added). Thus, the Legislature’s reference to liability “under the provisions of this chapter” was express choice-of-law language mandating the application of New York law rather than the “laws of [the corporation’s] domicile.” [Id.](#) As discussed above, §1319 contains no such language, and New York courts have consistently applied the internal-affairs doctrine to actions brought pursuant to §1319 in the 60 years since its enactment.

The continued application of the internal-affairs doctrine after *Culligan* is hardly surprising because, just ten days prior, this Court applied the internal-affairs doctrine in a foreign derivative action. [*Lerner*, 119 A.D.3d at 127-28](#). As the trial court recognized, if this Court wanted *Culligan* to change that clear, recent precedent, it “most assuredly would have stated just that and why.” (R47.) Indeed, where this Court intends to “depart from settled principle,” it does so “explicitly” and “not on the basis of a one-paragraph memorandum opinion that does not cite or discuss the relevant precedent let alone express an intent to overrule it.” [*Orozco v. City of N.Y.*, 200 A.D.3d 559, 562 \(1st Dep’t 2021\)](#). Thus, in the nine years since *Culligan*, courts have unanimously rejected the argument that *Culligan* displaced the internal-affairs doctrine.⁸ See [*Arison*, 70 Misc. 3d at 244-45 & n.3](#) (*Culligan* “concerned the regulation of conduct within New York and did not purport to alter settled New York law on the application of the internal affairs doctrine in breach of

⁸ Pre-*Culligan* courts reached the same conclusion regarding plaintiff’s choice-of-law argument. For example, in *Levin v. Kozlowski*, 45 A.D.3d 387 (1st Dep’t 2007), the plaintiff argued that “BCL §§ 626 and 1319 directly contradict the proposition . . . that the right of shareholder of a foreign corporation doing business in New York to bring a derivative action is exclusively governed by the law of the foreign jurisdiction.” Brief for Plaintiffs-Appellants, *Levin v. Kozlowski*, 45 A.D.3d 387 (1st Dep’t 2007), 2006 WL 6153885, at *26. Although this Court resolved the appeal on other grounds, it expressly noted that “[w]ere we to reach the merits of the issue of which jurisdiction’s law should be applied, we would hold that the law of Bermuda, where Tyco was incorporated, is applicable since the question of corporate governance is at issue.” [*Levin*, 45 A.D.3d at 388](#); see also [*Potter v. Arrington*, 11 Misc. 3d 962, 966 \(Sup. Ct. Monroe Cnty. 2006\)](#) (Section 1319 “is not a conflict of laws rule and does not compel the application of New York law; rather it must be viewed as the statutory predicate allowing New York to follow its conflict rules in determining the applicable law.”).

fiduciary duty actions”); [*Stephen Blau MD Money Purchase Pension Plan Tr. v. Dimon*, No. 650654/2014, 2015 N.Y. Slip Op. 32909\(U\), at *8 n.1 \(Sup. Ct. N.Y. Cnty. May 6, 2015\)](#) (“The court finds nothing in *Culligan* . . . that would suggest the court not follow *Lerner*. If the court in *Culligan* wanted to change the clear precedents from *Hart* to *Lerner*, it most assuredly would have said just that, and why.”); [*David Shaev Profit Sharing Plan v. Bank of Am. Corp.*, No. 652580/11, 2014 N.Y. Slip Op. 33986\(U\), at *6-8 \(Sup. Ct. N.Y. Cnty. Dec. 29, 2014\)](#).

Nor does this Court need to overrule *Culligan* to reject plaintiff’s argument. *Culligan* concerned a narrow exception (that does not apply here) to the internal-affairs doctrine left open by the Court of Appeals, as the trial court correctly concluded. (R47.) In [*Greenspun*](#), the Court of Appeals “le[ft] open what law [New York courts] might apply were there proof from which it could properly be found” that the nominal-defendant was “so ‘present’ in [New York] as perhaps to call for the application of New York law.” [36 N.Y.2d at 477-78](#). The nominal defendant in *Culligan* satisfied this limited exception because that Bermuda-incorporated “foreign corporation” conducted all of its business in New York and all of its owners and directors lived and worked in New York. Brief for Plaintiffs-Appellants,

Culligan, 118 A.D.3d 422, 2013 WL 9743995, at *18-19. By contrast, Barclays PLC does not fit within the *Greenspun* exception.⁹ (R719-20, ¶13.)

4. The Trial Court Correctly Relied on the On-Point and Persuasive Analysis in *Arison* and *Winters*

Finally, plaintiff's argument that *Arison* and *Winters* were either incorrectly decided or inapplicable is unpersuasive. Plaintiff claims that *Arison* ignored settled rules of statutory construction and disregarded §1319's text in determining that §1319 is a "mere statutory predicate to jurisdiction" over foreign derivative suits, but does not require application of New York law in such cases. (Br. 36.) For all the reasons discussed above, plaintiff's reliance on the text of §1319 (and its other arguments) are unavailing. (*Supra* §I.B.)¹⁰

Plaintiff is also wrong to assert that *Winters* is inapposite because the plaintiff in that case "did not assert that §626(a)'s share-ownership requirement governed

⁹ [*Norlin Corp. v. Rooney, Pace Inc.*, 744 F.2d 255 \(2d Cir. 1984\)](#)—the only other authority cited by plaintiff—is similarly distinguishable. The Second Circuit expressly relied on *Greenspun* in holding that a New York court would likely not apply the internal-affairs doctrine to claims involving a Panamanian corporation that had "no significant operations in that country" but significant presence in New York. [744 F.2d at 259, 263-64](#). No federal court has since relied on §1319 to reject the application of the internal-affairs doctrine to foreign derivative actions. See [Locals 302 & 612 of Int'l Union of Operating Eng'rs – Emps. Constr. Indus. Ret. Tr. v. Blanchard](#), No. 04-cv-5954, 2005 WL 2063852, at *4 & n.2 (S.D.N.Y. Aug. 25, 2005); [Hbouss v. Coca-Cola Enters., Inc.](#), 05-cv-7965, 2006 WL 2285598, at *4 n.2 (S.D.N.Y. Aug. 9, 2006); [Seidl v. Am. Century Cos., Inc.](#), 713 F. Supp. 2d 249, 255 (S.D.N.Y. 2010); [cf. McDermott Inc. v. Lewis](#), 531 A.2d 206, 214 (Del. 1987) (rejecting *Norlin*).

¹⁰ And as discussed below, *Arison* correctly concluded that, under English law, membership is a substantive requirement of the Companies Act. (*Infra* §I.C.1(b).)

standing to sue,” “[n]or did the trial court rule on whether §1319 made §626 applicable.” (Br. 35.) Plaintiff ignores that the *Winters* court determined that the internal-affairs doctrine dictates that English substantive law governed the merits of a derivative suit brought in New York on behalf of an English corporation (R1248), and that English common law governs a plaintiff’s standing to maintain derivative claims on behalf of an English corporation in a New York court. (R1249-50.)¹¹

For all these reasons, the trial court correctly applied the well-established internal-affairs doctrine to determine that the law of incorporation—here, English law—controls substantive prerequisites to a shareholder derivative claim.

C. The Trial Court Correctly Held That Plaintiff’s Claims Are Barred by the Substantive Standing Requirements of English Law

Applying substantive English law, the trial court correctly held that plaintiff lacks standing to maintain its derivative claims under either the Companies Act or English common law. (*Supra* p. 10 (citing R44-45).) Consistent with the holding of *Arison* and the un rebutted Moore Affirmations, the trial court held that the membership requirement of the Companies Act is a substantive requirement, not merely a procedural hurdle. (R45.) Having determined that the membership requirement applies, the trial court properly relied on plaintiff’s counsel’s admission

¹¹ Plaintiff also claims the issues on appeal in *Winters* “have nothing to do with the present issue on appeal before this Court.” (Br. 35 n.15.) Plaintiff’s omission of the fact that the plaintiff in *Winters* did not challenge or appeal the application of the internal-affairs doctrine is more notable.

in its opposition briefing, together with the Ellwood Affirmation, to conclude that plaintiff was indisputably not a member of Barclays PLC. (*Supra* p. 10 (citing R44-45).) Moreover, consistent with *Winters* and again with the un rebutted Moore Affirmations, the trial court correctly held that to the extent English common law applies, plaintiff also lacked standing. (R46.) Not only have plaintiff's arguments challenging these well-reasoned conclusions been waived, but they also lack merit.

1. Plaintiff's Belated Argument That the Membership Requirement Is Procedural, Rather Than Substantive, Fails

This Court need not pause long over plaintiff's argument that the membership requirement is a mere procedural rule. (Br. 48-52.) Plaintiff failed to raise this argument below (thus waiving it) and, in fact, conceded the substantive nature of the membership requirement in the Complaint. But even had plaintiff properly preserved this argument, the membership requirement is substantive, not procedural.

(a) Plaintiff Waived Any Argument That the Membership Requirement Is Not Substantive

Plaintiff has waived any argument that the Companies Act's membership requirement is procedural rather than substantive. In opposing defendants' motion to dismiss, which expressly argued that the membership requirement was substantive under both the Companies Act and English common law, plaintiff argued only that §1319 displaced the internal-affairs doctrine (R941), and did not assert that the membership requirement is a procedural rule. The only "procedural requirement"

plaintiff mentioned was the Companies Act’s requirement “to seek judicial permission from a court in England.” (R941.) Accordingly, plaintiff’s new argument “is improperly raised for the first time on appeal, and thus not preserved for review.” [*Pirraglia v. CCC Realty NY Corp.*, 35 A.D.3d 234, 235 \(1st Dep’t 2006\)](#); [*Shih-Hsieh*, 141 A.D.2d at 276](#) (“Nor, obviously, may a party argue on appeal a theory never presented to the court of original jurisdiction.”).

(b) The Companies Act’s Membership Requirement Is Substantive

In any event, plaintiff’s unpreserved argument is meritless. Notably, it is contradicted by the Complaint itself, which expressly admitted that the Companies Act’s membership provision is substantive. (R776-78, ¶91 (“Section 260 Derivative Claims,” which states that the chapter “applies to proceedings in England and Wales or Northern Ireland by a member of the company,” is one of the “substantive provisions of that Act” that “apply to this litigation.” (emphasis added).) See [*Srivatsa v. Rosetta Holdings LLC*, Nos. 2021-04106, 2021-04107, 2023 WL 1974437, at *1 \(1st Dep’t Feb. 14, 2023\)](#) (plaintiff’s assertion made in opposing motion to dismiss that “d[id] not appear in the complaint and contradict[ed] plaintiff’s allegation therein” was “unavailing”).

Moreover, under the three-factor test articulated by the Court of Appeals in *Davis*, and as the *Arison* court concluded, the membership requirement is substantive. See [*Arison*, 70 Misc. 3d at 248](#). (R44-45.) Under the first *Davis* factor,

which looks to the plain language of the rule, “the statutory text of the Companies Act does not support the conclusion that the membership requirement is merely a procedural rule limited to proceedings in U.K. courts.” [Arison, 70 Misc. 3d at 250](#); *see also* [CBF Indústria de Gusa S/A. v. AMCI Holdings, Inc., No. 13-cv-2581, 2023 WL 185493, at *23 \(S.D.N.Y. Jan. 13, 2023\)](#) (noting the “well-reasoned” *Arison* analysis distinguishing the substantive Companies Act membership requirement from Cayman procedural requirements).¹²

Plaintiff argues that, because the preamble to Chapter 1 of the Companies Act provides that it “applies to proceedings in England and Wales or Northern Ireland,” Chapter 1’s rules are forum-specific “procedural rules and are thus inapplicable to shareholder derivative actions brought in courts outside England.” (Br. 50.) But even plaintiff’s Complaint expressly relies on part of Chapter 1, [§260\(3\)](#), as a substantive basis for its claims. (R776-78, ¶91.) Nor does the language seized on by plaintiff provide support for concluding that Chapter 1 is intended to be a forum-specific procedural rule. Instead, as *Arison* explained (consistent with the expert testimony of Mr. Moore), the preamble is intended to distinguish Part 11, Chapter 1, which

¹² The unrebutted Moore Affirmation also demonstrates that English law views the membership requirement “[a]s a matter of substantive English company law.” (R85, ¶8(b).) Not only is a foreign jurisdiction’s designation of the rule as procedural or substantive “instructive,” [Davis, 30 N.Y.3d at 252](#), but plaintiff’s president and counsel have argued to this Court that foreign law’s designation of a rule as substantive or procedural should be dispositive, Brief for Plaintiffs-Appellants at 44, *Haussmann v. Baumann*, Nos. 2022-02491, 2022-04806 (1st Dep’t Jan. 30, 2023), NYSCEF No. 13.

applies to proceedings in England and Wales or Northern Ireland, from Chapter 2, which applies to proceedings in Scotland. Thus, it makes no sense to conclude that the entire Chapter 1 set forth forum-specific procedural rules based on the preamble because parts of Chapter 1 are undoubtedly substantive, as the Complaint itself recognizes. [Arison, 70 Misc. 3d at 248](#).

Plaintiff’s attempt to analogize the membership requirement of the Companies Act to the judicial permission requirements of Cayman Rule 12A, which the Court of Appeals analyzed in *Davis* (Br. 51), is unavailing. In [Davis](#), the Court of Appeals found that the judicial permission requirement of Rule 12A was procedural, in part, because it invoked “procedures . . . specific to Cayman Islands litigation”—it expressly pertained to derivative actions “begun by writ” and was triggered when the defendant had “given notice of intention to defend.” [30 N.Y.3d at 253-54](#). Unlike Rule 12A, which is “steeped in the idiosyncrasies of Cayman Islands procedure,” [Arison, 70 Misc. 3d 234 at 249](#), the Companies Act’s membership requirement contains no language invoking unique procedures like the Cayman “writ” requirement or the “specified form” under Cayman procedure, [Davis, 30 N.Y.3d at 253](#). Moreover, [Davis](#) also emphasized that Rule 12A did not “specifically apply to actions involving *Cayman*-incorporated companies” and therefore the plain language suggested that the rule served as “a gatekeeping function, but only as to derivative actions brought in the Cayman Islands.” [Id. at 254](#). In contrast, the text of

the membership requirement in the Companies Act expressly requires the purported plaintiff be a member of “a company formed and registered in the United Kingdom under this Act.” (R91, ¶30.)¹³

Nor can the Second Department’s decision in [Mason-Mahon v. Flint, 166 A.D.3d 754 \(2d Dep’t 2018\)](#), help plaintiff’s case. The Second Department’s holding was limited to the judicial permission requirement set forth in [§261\(1\)](#), which is not at issue here. And, as the *Arison* court reasoned, unlike the judicial permission requirement, the “requirement that the derivative plaintiff be a ‘member’ is not tied to unique procedural trappings of foreign courts.” [Arison, 70 Misc. 3d at 250](#).

With respect to the remaining *Davis* factors, there is no dispute that the membership requirement is substantive. Tellingly, plaintiff does not even address these factors. Under the second *Davis* factor, which considers whether the foreign statute concerns a right or remedy, the “real inquiry must be directed to the question whether [the plaintiff’s] right to bring this action involves no more than compliance

¹³ Plaintiff’s observation that the judicial permission rule of the Companies Act uses “terms specific to the practices of English courts” (Br. 51), does not save its claim. As a threshold point, defendants have not challenged the procedural nature of the judicial permission rule for purposes of their motion and this appeal. In any event, if language requiring permission to proceed automatically makes a requirement procedural, the Court of Appeals would have relied only on the language of Rule 12A requiring that “the plaintiff must apply to the Court for leave to continue the action” rather than detailing and relying upon the various idiosyncrasies of Cayman procedures invoked by the rule. [Davis, 30 N.Y.3d at 251](#). Indeed, the Court of Appeals has found judicial permission requirements of certain countries’ statutes, including those of the British Virgin Islands and Canada, to be substantive. [Id. at 254-55](#).

with procedural requirements extraneous to the substance of their claim, or whether it concerns the very nature and quality of their substantive right, powers and privileges as stockholders.” [Arison, 70 Misc. 3d at 251](#) (citation omitted). Under English law, only a member has the right to bring a derivative action. (R91, ¶32.) That is, the membership requirement has the effect of “preventing what might otherwise have been a cause of action from ever arising” and thus is substantive. [Tanges v. Heidelberg N.A., Inc., 93 N.Y.2d 48, 55-56 \(1999\)](#); [Arison, 70 Misc. 3d at 252](#) (“The membership requirement in the Companies Act shapes the substantive rights of stakeholders to sue derivatively on behalf of English corporations.”).

Similarly, the third factor articulated in *Davis*, which examines policy considerations, also supports the substantive nature of the membership requirement because that requirement, for example, “discourages forum shopping by acknowledging the Companies Act’s uniform standard for derivative actions brought on behalf of English companies, wherever they are brought.” [Arison, 70 Misc. 3d at 253](#). Again, plaintiff fails to present any argument on this factor. Accordingly, plaintiff must meet the membership requirement to have standing under the Companies Act to bring this case.

2. Based on Plaintiff’s Admission and the Evidence, the Trial Court Correctly Determined That Plaintiff Was Not a Member of Barclays PLC

Justice Reed correctly determined that it is beyond dispute that plaintiff is not a member of Barclays PLC. (R44-45.) Plaintiff does not challenge that, to qualify as a “member,” plaintiff must be the legal owner of shares of the company and have its name “entered in its register of members.” (R91, ¶31; *accord* R1140-42, ¶¶8-14.) Plainly, the Complaint fails to satisfy this second requirement, as plaintiff’s only allegation with respect to membership is the statement that its common shares (purportedly converted from ADRs in 2020) are “registered with Barclays and [plaintiff] is hence a ‘member of the company.’” (R750, ¶30.) This conclusory statement conspicuously fails to allege that plaintiff’s name appears on the share register and thus fails plaintiff’s burden, even at the pleading stage. *See Mamoon v. Dot Net Inc.*, 135 A.D.3d 656, 658 (1st Dep’t 2016) (“bare legal conclusions” are not presumed to be true); *Heritage Partners, LLC v. Stroock & Stroock & Lavan LLP*, 133 A.D.3d 428, 428 (1st Dep’t 2015) (“unsupported factual allegations, speculation and conclusory statements” are insufficient). This omission is no surprise because a binding admission by plaintiff’s counsel and the Ellwood Affirmation conclusively demonstrate that plaintiff is not a member. (R939-940; R719, ¶11.)

(a) The Trial Court Correctly Relied on Plaintiff's Binding Admission That It Was Not a Member of Barclays PLC

Plaintiff's conclusory allegation that it is "a member of the company" is insufficient to plead standing in the face of plaintiff's own contradictory admission to the contrary. See [Wilson v. Tully, 243 A.D.2d 229, 234 \(1st Dep't 1998\)](#). When faced with evidence that plaintiff did not appear on the register, plaintiff tellingly did not attempt to amend this allegation or submit competing evidence. Instead, plaintiff admitted that it "could become a 'member,' but it would be time-consuming to achieve and cumbersome once achieved." (R939-R940 n.9 (emphasis in original)).¹⁴ The trial court properly relied on this binding admission. See [Pok Rye Kim v. Mars Cup Co., 102 A.D.2d 812, 812 \(2d Dep't 1984\)](#).¹⁵

Plaintiff's attempt to avoid this result by claiming that, at oral argument, "counsel reminded the lower court that Plaintiff made no such admission" (Br. 55) falls short. Counsel cannot disavow its own submission filed with the trial court, and "it is irrelevant that the admissions were made in part by counsel on behalf" of

¹⁴ Plaintiff made other admissions confirming this fact. (See R939 ("The issue arises because Plaintiff, like virtually all American retail investors, holds its shares through a nominee, not directly in its own name.")) (emphasis added).)

¹⁵ "A formal judicial admission is an act of a party done in the course of a judicial proceeding, which dispenses with the production of evidence by conceding, for the purposes of the litigation, the truth of a fact alleged by the adversary." [People v. Brown, 98 N.Y.2d 226, 232 n.2 \(2002\)](#). To the extent plaintiff argues that counsel's statements in the opposition constituted only an informal judicial admission, it is still "evidence of the fact" that plaintiff is not a member of Barclays PLC on which the trial court was entitled to rely. [Id.](#)

plaintiff or “that they were contained in affidavits or briefs.” See [*In re Liquidation of Union Indem. Ins. Co. of N.Y.*, 89 N.Y.2d 94, 103 \(1996\)](#). Because plaintiff’s formal judicial admission in response to defendants’ motion is binding, the Order can be affirmed on this basis alone.

(b) The Trial Court Correctly Relied on the Ellwood Affirmation, Which Plaintiff Failed to Challenge and Established That Plaintiff Was Not a Member of Barclays PLC

As further confirmation of plaintiff’s nonmember status, the trial court correctly relied on the Ellwood Affirmation demonstrating that plaintiff was not “a registered, legal owner of Barclays PLC shares.” (R719, ¶11.) Plaintiff argues that (1) the trial court was “precluded from considering Ellwood’s affirmation” on a [CPLR 3211\(a\)\(7\)](#) motion and the Ellwood Affirmation was not “documentary evidence” permitted by [CPLR 3211\(a\)\(1\)](#); and (2) the Ellwood Affirmation was inadmissible hearsay. (Br. 53-54.) These arguments are untimely and therefore waived. Plaintiff elected not to raise them on three separate occasions: its opposition to the motion to dismiss, its (rejected) sur-reply, and at oral argument.¹⁶ See [*Bosco Credit V Tr. Series 2012-1 v. Johnson*, 177 A.D.3d 561, 562 \(1st Dep’t 2019\)](#) (“Defendants waived this argument by failing to raise it in their opposition to

¹⁶ Plaintiff argued at oral argument, for the first time, that plaintiff’s membership status should be a matter for discovery (R26), but even then failed to argue that the Ellwood Affirmation should not be considered. (R26-27.)

plaintiff's motion for summary judgment, in their reply in further support of their cross motion and opposition to plaintiff's motion, or during oral argument on the motions."); [*Guevara-Ayala v. Trump Palace/Parc LLC*, 205 A.D.3d 450, 451 \(1st Dep't 2022\)](#) ("[T]he parties to the contract waived any hearsay objection by failing to raise any in their respective motion papers."); [*Nurlybayev v. SmileDirectClub, Inc.*, 205 A.D.3d 455, 457 \(1st Dep't 2022\)](#) (argument raised for the first time on an appeal from the dismissal of a complaint was unpreserved).

This Court's inquiry can end here, but plaintiff's arguments are also without merit. To start, plaintiff's "contention that this Court is limited to the pleadings, when reviewing a motion to dismiss pursuant to [CPLR 3211\(a\)\(7\)](#), is not a completely accurate statement of the law." [*Basis Yield Alpha Fund \(Master\) v. Goldman Sachs Grp., Inc.*, 115 A.D.3d 128, 134 \(1st Dep't 2014\)](#). A motion under [CPLR 3211\(a\)\(7\)](#) "may be used to dispose of an action in which the plaintiff identified a cognizable cause of action but failed to assert a material allegation necessary to support the cause of action." *Id.* In those circumstances, "the Court of Appeals has made clear that a defendant can submit evidence in support of the motion attacking a well-pleaded cognizable claim." *Id.* (citations omitted).

Because membership is a legal prerequisite to plaintiff's claims under English law, on a motion under [CPLR 3211\(a\)\(7\)](#), the trial court may consider evidence that shows plaintiff's "claim[s are] flatly rejected by the documentary evidence." *Id.* at

[135](#). And even if plaintiff is correct that an affirmation is “not ‘documentary evidence’ within the meaning of CPLR 3211(a)(1)” (Br. 54), under [CPLR 3211\(a\)\(7\)](#), affidavits can be considered to “conclusively establish that plaintiff has no cause of action.” [Allen v. Gordon, 86 A.D.2d 514, 515 \(1st Dep’t 1982\), aff’d, 56 N.Y.2d 780](#). Here, the Ellwood Affirmation does exactly that: it shows that plaintiff is not listed on the share register, and thus is not a member. Plaintiff did not submit any rebuttal evidence for the simple reason that it cannot refute this fact.

Plaintiff’s hearsay argument is similarly unavailing. Plaintiff erroneously asserts that the Ellwood Affirmation is based on hearsay “statements” and not a review of the “share register.” (Br. 53.) Plaintiff’s error seems to stem from its assumption that Equiniti made “statements” to Ellwood upon which she relied. Plaintiff ignores that Equiniti, as the registrar, maintains the Barclays PLC share register. As such, Ellwood’s Affirmation, “submitted based upon documentary evidence[,] was sufficient to comply with the requirement that . . . an affidavit [be] from a person having personal knowledge.” [First Interstate Credit All., Inc. v. Sokol, 179 A.D.2d 583, 584 \(1st Dep’t 1992\)](#); *see also* [Comptroller v. Gards Realty Corp., 68 A.D.2d 186, 188-89 \(2d Dep’t. 1979\)](#).¹⁷

¹⁷ Moreover, any purported uncertainty over the extent of Ellwood’s personal knowledge stems from plaintiff’s choice to not raise these issues with the trial court. *See* [DiLeo v. Blumberg, 250 A.D.2d 364, 366 \(1st Dep’t 1998\)](#) (waiver of a challenge to the admissibility of an affidavit that could have been cured had it been raised below cannot be excused); [U.S. Bank Nat’l Ass’n v. Brown, 186 A.D.3d 1038, 1040 \(4th Dep’t 2020\)](#).

Finally, plaintiff’s transparent attempt to create a dispute of fact falls short. Plaintiff argues that the Ellwood Affirmation, at most, raised a disputed issue of fact because a verified complaint “may be utilized as an affidavit.” [CPLR 105\(u\)](#). But “[a] verified pleading will be of no value as an affidavit when the circumstances require evidentiary detail and the pleading is phrased in conclusory terms.” CPLR 105 (2013 Supp. Practice Commentary) (citing [Bethlehem Steel Corp. v. Solow](#), 51 N.Y.2d 870, 872 (1980)); see also [Celnick v. Freitag](#), 242 A.D.2d 436, 437 (1st Dep’t 1997). Here, plaintiff’s only allegation with respect to membership—information presumably within plaintiff’s control—is a bare conclusory statement that conspicuously failed to allege that its name appears on the share register, and plaintiff failed to provide any evidentiary detail either in the Complaint or in response to the Ellwood Affirmation. Indeed, when pressed by the trial court, plaintiff could point to nothing else. (See R26-28.) Accordingly, as the trial court correctly determined, “despite the conclusory statement in the complaint, it is apparent that the Plaintiff is not a registered member.” (R45.)

In sum, dismissal is appropriate under [CPLR 3211\(a\)\(7\)](#) “[w]hen evidentiary material is considered” and shows that there is “no significant dispute . . . that a material fact as claimed by the pleader to be one is not a fact at all.” [Guggenheimer v. Ginzburg](#), 43 N.Y.2d 268, 275 (1977). Based on plaintiff’s insufficient pleading, its subsequent admission that it was not a member of Barclays PLC, and the Ellwood

Affirmation, Justice Reed correctly held that plaintiff's membership in Barclays PLC was not in dispute. Because the membership requirement is a substantive aspect of English law governing under the internal-affairs doctrine, this Court should affirm the dismissal of the Complaint based on plaintiff's lack of standing.

3. If English Common Law Applies, Plaintiff Still Lacks Standing

Even if the Companies Act had not applied, plaintiff could not bring its claims under English common law for two reasons. First, membership is a substantive requirement not only for derivative claims brought under the Companies Act, but also for the narrow circumstances in which derivative claims are permitted under English common law. (R91, ¶32 (“[T]he exceptions to the rule in *Foss v. Harbottle* confer limited rights on members of the company, not on any other person.”); R1140-42, ¶¶6-14). Plaintiff has never challenged this fundamental principle. Thus, even under English common law, plaintiff does not have standing because it is not a registered member. (*Id.*)

Second, English common law generally does not permit derivative claims, and, as the trial court correctly determined, plaintiff cannot satisfy any of the narrow exceptions articulated in *Foss v. Harbottle* that would permit such a claim where the conduct: (1) infringed on the shareholder's personal rights; (2) would require a special majority to ratify; (3) was a “fraud-on-the-minority”; or (4) was *ultra vires*.

Here, plaintiff cannot satisfy any of these exceptions and does not challenge this ruling on appeal.

Notably, the *Winters* court held that where the shareholder derivative plaintiff asserting claims on behalf of U.K.-incorporated company brought suit in New York rather than in England or Wales, it was proceeding outside the Companies Act. (R1249-50.) Accordingly, the plaintiff was required to satisfy one of the exceptions to the prohibition against derivative claims under English common law. (*Id.*) The *Arison* court also recognized that “a case can be made that [Section 260\(2\)](#) . . . requires that derivative actions on behalf of English companies can *only* be brought in U.K. courts.” [70 Misc. 3d at 250 n.8](#) (relying on the testimony of Mr. Moore). Because plaintiff was not a member of Barclays PLC—which doomed its claims under either the Companies Act or common law—the trial court did not need to address common law exceptions. But even if the trial court had erred on the question of membership, plaintiff’s clear failure to plead any of the common law exceptions compels dismissal.

II. DISMISSAL OF THE COMPLAINT IN ITS ENTIRETY CAN BE AFFIRMED ON ALTERNATIVE GROUNDS

Because plaintiff lacked standing to maintain this derivative action, the trial court did not reach the other dispositive shortcomings of the Complaint. Even if this Court were to disagree on standing, however, it “can affirm on alternative bases argued to, but not reached by, the motion court.” [Chanin v. Machcinski, 139 A.D.3d](#)

[490, 491 \(1st Dep’t 2016\)](#). Here, numerous independent, alternative grounds would support dismissal.

A. This Court Lacks Subject-Matter Jurisdiction under §1319

Plaintiff failed to plead that Barclays PLC is “a foreign corporation doing business” in New York as required by §1319 and instead relied on a less exacting—and inapplicable—purposeful availment standard. Plaintiff cannot satisfy either standard, and the Complaint can be dismissed on this basis alone.

1. The Heightened “Doing Business” Standard Applies to §1319(a)(2)

Plaintiff cannot meet its burden of overcoming the presumption that Barclays PLC is “doing business” in the U.K.—“where [it is] incorporated”—“and not in New York.” [Nick v. Greenfield, 299 A.D.2d 172, 173 \(1st Dep’t 2002\)](#). New York has employed two alternative standards to determine whether a corporation’s activities in New York overcome this presumption: When a particular statute applying the “doing business” standard infringes on Congress’s constitutional power to regulate interstate commerce and therefore implicates the Commerce Clause, the burden of overcoming the presumption is higher. See [Belton Elecs. Corp. v. Selbst, 58 A.D.2d 560, 560 \(1st Dep’t 1977\)](#). Under that standard, a foreign corporation is only “doing business in New York” if there is “evidence of systematic and regular activity” in New York. [Cadle Co. II, Inc. v. Klar, 278 A.D.2d 40, 40 \(1st Dep’t 2000\)](#). Alternatively, when there are no Commerce Clause concerns, courts have applied a

less stringent standard that “is met if a New York court could exercise general jurisdiction over a foreign corporation consistent with the Due Process Clause.” [*AirTran N.Y., LLC v. Midwest Air Grp., Inc.*, 46 A.D.3d 208, 214 \(1st Dep’t 2007\)](#).

Here, ample authority demonstrates that §1319, which allows New York courts to exercise subject-matter jurisdiction over derivative suits relating to foreign corporations that do business in New York, implicates Commerce Clause concerns and therefore triggers the heightened doing-business standard. *See Blau, 2015 N.Y. Slip Op. 32909(U), at *12* (§1319 implicates the Commerce Clause, under which “a state ‘has no interest in regulating the internal affairs of foreign corporations’”). Indeed, as the United States Supreme Court has explained, the “free market system depends at its core upon the fact that a corporation—except in the rarest situations—is organized under, and governed by, the law of a single jurisdiction, traditionally the corporate law of the State of its incorporation.” [*CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 90 \(1987\)](#). By definition, a derivative action allows a stockholder “to step into the corporation’s shoes,” [*Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 548 \(1949\)](#), and assert a “claim of the corporation against directors or third parties,” [*Ross v. Bernhard*, 396 U.S. 531, 538 \(1970\)](#). Thus, this “extraterritorial effect” of exercising jurisdiction over foreign derivative actions through §1319 implicates “interstate commerce.” [*Edgar*, 457 U.S. at 642](#).

Applying the heightened doing-business standard to §1319 is consistent with *AirTran*, which plaintiff misinterprets. In [AirTran](#), this Court found that §1315—which allows a shareholder to request a list of shareholders but does not substantively affect the corporation’s rights—did “not burden commerce, much less impermissibly burden it” nor did it “subject[] foreign corporations to inconsistent regulation of their internal affairs.” [46 A.D.3d at 217](#) (citing [Sadler v. NCR Corp.](#), [928 F.2d 48, 53-54 \(2d Cir. 1991\)](#)); see also [McDermott](#), [531 A.2d at 216-17](#) (explaining the “serious constitutional proportions” of the internal-affairs doctrine). Here, by contrast, §1319 implicates interstate commerce because it relates to the internal management of a foreign corporation. Indeed, the gravamen of plaintiff’s appeal is that §1319 displaces the internal-affairs doctrine, by definition subjecting foreign corporations to inconsistent regulation of their internal affairs. See [Sadler](#), [928 F.2d at 55](#) (“if a state purported to regulate . . . aspects of the internal affairs of a foreign corporation,” it would create “irreconcilable conflict” implicating Commerce Clause concerns).

2. Barclays PLC Was Not “Doing Business” in New York

Plaintiff has repeatedly failed to present (and thus waived) any argument that it has adequately alleged that Barclays PLC satisfied the heightened standard for doing business in New York. See [Copp](#), [62 A.D.3d at 31](#). Before both the trial court and on appeal, plaintiff has merely asserted that the heightened standard does not

apply, and argued solely that Barclays PLC satisfied a less exacting “purposeful-availment standard.” (R936; Br. 40.)¹⁸ Plaintiff’s failure to argue, much less plead, that Barclays PLC meets the correct, heightened “doing business” standard mandates dismissal. See [Aybar v. Aybar, 37 N.Y.3d 274, 282 \(2021\)](#) (specific jurisdiction argument was not preserved where plaintiff failed to raise it in the trial court or appellate department); see also [Lamarr v. Klein, 35 A.D.2d 248, 250 \(1st Dep’t 1970\)](#) (“The law is clear that . . . the burden of proving jurisdiction is upon the party who asserts it.”).

In any event, plaintiff failed to plead facts sufficient to show that Barclays PLC was “doing business” in New York under even the less demanding standard. Nearly all of plaintiff’s arguments hinge on imputing to Barclays PLC business done by its subsidiaries. (Br. 43.) Although a subsidiary’s contacts could be imputed to the parent for general jurisdiction purposes when *AirTran* was decided, the Supreme Court subsequently has held otherwise. See [Daimler AG v. Bauman, 571 U.S. 117, 134-37 \(2014\)](#) (rejecting the exercise of general jurisdiction over a foreign corporation based on the activities of its subsidiary as inconsistent with due

¹⁸ Plaintiff’s “purposeful availment” authority is inapposite, discussing inapplicable requirements for specific jurisdiction rather than the “doing business” standard under the BCL. See [Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 141 S. Ct. 1017, 1024 \(2021\)](#) (“Specific jurisdiction is different”); [Ingenito v. Riri USA, Inc., 89 F. Supp. 3d 462, 475-76 \(E.D.N.Y. 2015\)](#) (analyzing “transacts any business” requirement for personal jurisdiction).

process).¹⁹ Indeed, the fact that corporate subsidiaries conduct business in New York is insufficient, as a matter of law, to establish that Barclays PLC itself does business in New York. See [*FIMBank P.L.C. v. Woori Fin. Holdings Co. Ltd.*, 104 A.D.3d 602, 602-03 \(1st Dep’t 2013\)](#) (plaintiff failed to show that parent’s control over subsidiary was “so complete” that subsidiary was “merely a department” of parent; instead, plaintiff merely showed “common ownership, demonstrating that [parent] is simply a holding company” (citation omitted)).²⁰

Plaintiff’s remaining “indicia of purposeful availment” are insufficient. Plaintiff asserts that “Barclays has commenced plaintiff-side litigation in New York and defended cases here,” and that “Barclays’s Board and its Board committees have held over 15 meetings in NY.” (Br. 43-45.) But §1301 expressly provides that “a foreign corporation shall not be considered to be doing business in this state” by “(1) Maintaining or defending any action or proceeding, whether judicial, administrative, arbitral or otherwise, or effecting settlement thereof or the

¹⁹ Although *Daimler* left open the possibility of an “exceptional” case in which general jurisdiction could be exercised over a corporation elsewhere, Barclays PLC is not one of those cases because it has not “transported [its] principal ‘home’ to the United States” nor is it incorporated in New York. [*Waldman v. Palestine Liberation Org.*, 835 F.3d 317, 335 \(2d Cir. 2016\)](#); [*Daimler*, 571 U.S. at 137-38](#).

²⁰ Likewise, even alleging that Barclays PLC exercised “[s]ome control over the subsidiary” in New York (Br. 43) cannot establish that a parent was “doing business” in New York under the heightened standard. See [*Royce*, 221 A.D.2d at 406-07](#) (parent corporation was not deemed to be “doing business” through its subsidiary under heightened standard applicable to §1312).

settlement of claims or disputes” or “(2) Holding meetings of its directors.” [BCL §1301\(b\)\(1\)–\(2\)](#).

Similarly, it is well established that plaintiff’s allegation that “Barclays regularly comes to NY to tap its debt and equity markets” (Br. 43) falls short of pleading that Barclays PLC is “doing business” here. See [William L. Bonnell Co. v. Katz](#), 23 Misc. 2d 1028, 1031 (Sup. Ct. N.Y. Cnty. 1960) (“facilitate[ing] credit arrangements” in New York failed to satisfy “doing business” requirement); [Neth. Shipmortgage Corp. v. Madias](#), 717 F.2d 731, 739-40 (2d Cir. 1983) (bank accounts, retention of counsel, solicitation and negotiation of business loans, and the partial closing of 19 loans over two-year period in New York insufficient to demonstrate foreign corporation was “doing business”).

Finally, plaintiff’s claim that “Barclays and its subsidiaries have entered into multiple settlement agreements and consent orders,” and thus “purposefully availed” themselves of New York (Br. 44-46), relies on materials attached to a sur-reply that the trial court denied permission to file. It is therefore nothing more than a last-ditch attempt to introduce materials outside the Record on Appeal, and defendants have moved to strike these materials. (Notice of Mot., *Ezrasons, Inc. v. Rudd*, No. 2022-04657 (1st Dep’t March 13, 2023), NYSCEF No. 10.) Moreover, plaintiff never sought to use these documents for this purpose (even when unsuccessfully seeking

leave to file a proposed sur-reply) and thus waived the argument. See [Copp, 62 A.D.3d at 31](#).

In any event, the agreements and consent orders, even if considered, do not establish that Barclays PLC has “systematic and regular contacts” with New York. First, plaintiff’s characterizations of these agreements are misleading at best and inaccurate at worst. Barclays PLC is not even a party to five of the seven agreements mentioned. And of the five “additional agreements” that plaintiff claims contain “[s]imilar consent-to-jurisdiction and choice-of-New York law provisions” (Br. 45), two do not. Regardless, a contractual consent-to-jurisdiction clause does not establish general jurisdiction over a foreign corporation, [cf. Aybar, 37 N.Y.3d at 290](#) (a foreign corporation’s consent to service of process did not include consent to general jurisdiction), much less that the signatory corporation’s activities in New York were “so systematic and regular as to manifest continuity of activity in the jurisdiction,” [Interline Furniture, Inc. v. Hodor Indus. Corp., 140 A.D.2d 307, 308 \(2d Dep’t 1988\)](#). Plaintiff bears the burden to show that Barclays PLC conducts “systematic and regular activities” here, and for all the reasons discussed above, plaintiff falls short. See [Palisades Tickets, Inc. v. Daffner, 118 A.D.3d 619, 620 \(1st Dep’t 2014\)](#).

Finally, even if a contractual consent-to-jurisdiction provision related to an action could establish that a foreign corporation was “doing business” in New York,

the derivative claims asserted in this action do not arise from or relate to the rights and obligations set forth in those agreements. As a simple example, plaintiff is incorrect to claim that the derivative claims asserted in the Complaint arose from the ADR agreement. (Br. 44-45.) Indeed, plaintiff amended its complaint to allege ownership of ordinary shares, rather than ADRs.²¹ See [*Tittle v. Enron Corp.*, 463 F.3d 410, 422 \(5th Cir. 2006\)](#) (“dispute ‘arises out of or relates to’ a contract if the legal claim underlying the dispute could not be maintained without reference to the contract.”); [*Doe v. Princess Cruise Lines, Ltd.*, 657 F.3d 1204, 1218 \(11th Cir. 2011\)](#) (“‘related to’ ‘marks a boundary by indicating some direct relationship; otherwise, the term would stretch to the horizon and beyond.’”). Instead, the gravamen of the Complaint is that individual defendants breached fiduciary duties to Barclays PLC by creating a supposed culture of noncompliance at the company, as a consequence of which certain employees eventually engaged in misconduct that ultimately prompted various investigations and litigations over a course of a decade. At most, then, the action and the various settlement agreements both arise out of and relate to the underlying alleged noncompliance; not to each other. See [*Imaging Holdings I, LP v. Isr. Aerospace Indus. Ltd.*, 26 Misc. 3d 1226\(A\), 2009 N.Y. Slip Op.](#)

²¹ Plaintiff is also wrong to claim that ADR shares “have all the legal rights as the common shares, including standing to assert claims derivatively for Barclays.” (Br. 44) (emphasis added). As explained above, a shareholder must appear on the Barclays PLC share register to be a member for purposes of standing. (*Supra* §I.C.2.)

[52749\(U\)](#), at *4 (Sup. Ct. N.Y. Cnty. 2009) (a contractual forum selection clause only applies when “the plaintiff’s web of claims depends on rights and duties that must be analyzed with reference to the [contract]”). Accordingly, this Court can affirm the dismissal of the Complaint on the alternative ground that the trial court lacked subject-matter jurisdiction.

B. Plaintiff Cannot Meet New York’s Procedural Requirements

Alternatively, this Court can dismiss the complaint in its entirety because plaintiff fails to meet New York’s procedural ownership and demand requirements. See [In re Facebook, Inc., IPO Derivative Litig.](#), 797 F.3d 148, 157 (2d Cir. 2015) (contemporaneous ownership rule is a “procedural requirement”); [Shaev](#), 2014 N.Y. Slip Op. 33986(U), at *5 (labeling the demand requirement “a procedural matter”).

1. Plaintiff Does Not Satisfy the Continuous Ownership Requirement

Plaintiff failed to plead that it satisfies New York’s continuous ownership requirement, which requires a derivative plaintiff to plead that it owned shares both at the time of the challenged events and the bringing of the action. [BCL §626\(b\)](#). Plaintiff does not allege when it acquired its “shares” or that it has continuously held Barclays PLC shares at all relevant times, instead pleading only in a conclusory fashion that it has “continuously held shares of Barclays at times relevant.” (R750, ¶30; R905 (emphasis added).) Generic, vaguely drafted allegations are insufficient

to plead that plaintiff “owned shares ‘throughout’ the alleged wrongdoing.” [Smith v. Stevens](#), 957 F. Supp. 2d 466, 469 (S.D.N.Y. 2013).

Indeed, after defendants highlighted that the Complaint does not allege when plaintiff acquired its “shares” or that plaintiff continuously held Barclays PLC shares at all relevant times (R63; R71-72), plaintiff did not argue otherwise. Instead, plaintiff invoked the “continuing wrong” exception. (R948-49.) But the “continuing wrong” exception is inapplicable here because plaintiff pleads a series of discrete and unrelated incidents involving different divisions, different products, and different individuals over a 12-year period, not a continuing wrong. (R80; R1131.)

2. Plaintiff Does Not Allege Facts Sufficient to Excuse Pre-Suit Demand

The Complaint can alternatively be dismissed because plaintiff admits that it failed to make a pre-suit demand on Barclays PLC’s board, and has failed to plead “with particularity . . . the reasons for not making such effort.” [BCL §626\(c\)](#); (R865, ¶248). Demand is futile only if: (1) “a majority of the board of directors is interested in the challenged transaction”; (2) the directors “did not fully inform themselves about the challenged transaction to the extent reasonably appropriate under the circumstances”; or (3) “the challenged transaction was so egregious on its face that it could not have been the product of sound business judgment.” [Marx](#), 88 N.Y.2d at 200-01. Here, plaintiff has not pleaded any exception, much less “with . . . particularity.” [Id.](#) at 201.

First, plaintiff’s generic allegations do not demonstrate that a majority of the Barclays PLC board was interested. Plaintiff claims that the majority of board members are “personally implicated” (R871, ¶255), and argued below that “the most dominant current directors” named as defendants “will prevent any honest investigation or evaluation of legal action (against them) by Barclays [PLC].” (R947.) This Court has repeatedly rejected these boilerplate arguments for excusing demand.²² See [Wandel ex rel. Bed Bath & Beyond, Inc. v. Eisenberg](#), 60 A.D.3d 77, 80-81 (1st Dep’t 2009); see also [Marx](#), 88 N.Y.2d at 200 (excusing demand in similar circumstances would allow “the exception to swallow the rule”); (R72-74; R1133).

Similarly flawed are plaintiff’s allegations that the board “economically benefitted from substantial parts of the wrongdoing” through their receipt of standard director compensation. (R872, ¶257.) Directors are only considered self-interested in transactions “where they will receive a direct financial benefit from the

²² Plaintiff’s corollary argument—that certain directors have been “handpicked” by other directors and that the director defendants “today are still friends, share social and economic interconnections and . . . are still loyal” (R871-72, ¶255)—has also been squarely rejected as a basis for excusing demand. See [Ret. Plan for Gen. Emps. of N. Miami Beach v. McGraw](#), 158 A.D.3d 494, 495 (1st Dep’t 2018) (“fraternal relationship” between directors insufficient to excuse demand); [Zacharius v. Kensington Publ’g Corp.](#), 42 Misc. 3d 1208(A), 2014 N.Y. Slip Op. 50011(U), at *9 (Sup. Ct. N.Y. Cnty. 2014) (“New York law requires a description of self-interest or control with greater particularity than simply stating that the board was ‘hand-picked.’”).

transaction which is different from the benefit to shareholders generally.” [Marx, 88 N.Y.2d at 202](#). The Complaint makes no such allegation.

Plaintiff also fails to allege that the director defendants “did not fully inform themselves about the challenged transaction to the extent reasonably appropriate under the circumstances.” [Marx, 88 N.Y.2d at 200](#); *see also* [Goldstein v. Bass, 138 A.D.3d 556, 557 \(1st Dep’t 2016\)](#) (dismissal appropriate where complaint contained “no particularized allegations as to what the board members should have considered or investigated to properly inform themselves about the challenged transactions”). Nor does plaintiff offer any factual allegations that these transactions were “egregious” beyond its own *ipse dixit*, which is insufficient. *See* [Bezio v. Gen. Elec. Co., 66 Misc. 3d 261, 270 \(Sup. Ct. N.Y. Cnty. 2019\)](#) (“bare bones and conclusory allegation[s]” insufficient to plead demand futility). Plaintiff attempts to point to defendants’ alleged “oversight failures,” but that is not the type of “egregious misconduct” (R947) that can excuse pre-suit demand. That “theoretical exception,” [Wilson, 243 A.D.2d at 238](#), applies in the rare situation in which there is conduct so egregious that it “simply does not qualify as a legitimate exercise of business judgment,” like when there is “the approval of a decade’s worth of backdated stock options,” [In re Comverse Tech., Inc., 56 A.D.3d 49, 56 \(1st Dep’t 2008\)](#). Plaintiff makes no such allegation here.

Finally, plaintiff argued below that Barclays PLC's alleged "whistleblower hostility" excused the demand requirement. (R948.) Even accepting plaintiff's characterization as true (it is not), whistleblower hostility still "is not on the [*Marx*] list of circumstances where demand is excused." [*Wyatt v. Inner City Broad. Corp.*, 118 A.D.3d 517, 517 \(1st Dep't 2014\)](#).

C. This Court Should Affirm the Dismissal of the Complaint under the New York's *Forum Non Conveniens* Doctrine

Alternatively, this Court should affirm the dismissal of the Complaint under New York's *forum non conveniens* doctrine, which permits dismissal where "in the interest of substantial justice the action should be heard in another forum." [*CPLR 327*](#); *see also Islamic Republic of Iran v. Pahlavi*, 62 N.Y.2d 474, 478-79 (1984). This Court may "exercise [its] discretion independently" and "dismiss on the basis of *forum non conveniens*." [*Shin-Etsu Chem. Co., Ltd. v. 3033 ICICI Bank Ltd.*, 9 A.D.3d 171, 175 \(1st Dep't 2004\)](#). Each of the six factors that influence the *forum non conveniens* analysis weighs in favor of dismissal. [*Pahlavi*, 62 N.Y.2d at 479](#).

1. The Alleged Claims Arose in the U.K., and the U.K. Has the Greatest Interest in Adjudicating Them

English courts have the greatest interest in adjudicating the claims alleged in this action. Indeed, these claims "belong to" Barclays PLC, a corporation incorporated in the United Kingdom, [*Auerbach v. Bennett*, 47 N.Y.2d 619, 631 \(1979\)](#), and are based on individual defendants' purported breach of duties in

oversight and management of Barclays PLC in the United Kingdom, *see* [Bader & Bader v. Ford](#), 66 A.D.2d 642, 647 (1st Dep’t 1979) (dismissing derivative action on *forum non conveniens* grounds in part because “the approval by or acquiescence of the board[] occurred in Michigan”). Thus, the claims arose (and any alleged loss occurred) in the United Kingdom. *See* [Glob. Fin. Corp. v. Triarc Corp.](#), 93 N.Y.2d 525, 529 (1999) (“When an alleged injury is purely economic, the place of injury usually is where the plaintiff resides and sustains the economic impact of the loss.”).

Moreover, the United Kingdom, as the jurisdiction of incorporation, “has an interest superior to that of all other [jurisdictions] in deciding issues concerning directors’ conduct of the internal affairs” of a corporation. [Hart](#), 129 A.D.2d at 185. In contrast, New York has only a “minimal” interest (if any) in matters concerning the internal governance of foreign corporations not “doing business” here. [Bluewaters Commc’ns Holdings, LLC v. Ecclestone](#), 122 A.D.3d 426, 428 (1st Dep’t 2014).²³

²³ To the extent plaintiff’s reply highlights the recent decision in [Employees Retirement System for the City of Providence v. Rohner](#), No. 651657/2022, slip op. (Sup. Ct. N.Y. Cnty. Jan. 30, 2023), NYSCEF No. 48, denying a motion to dismiss a derivative action on the basis of *forum non conveniens*, that case is inapposite. Unlike this action, which is based on a series of disparate events over the course of a decade occurring abroad, *Providence* relates to the collapse of a New York-based hedge fund purportedly due to derivative swap contracts entered into in New York by New York-based employees of the nominal-defendant, allegedly causing losses in New York.

2. The Application of English Law Would Substantially Burden New York Courts

Plaintiff's claims are governed by English law, and a court's need to apply foreign law is an "important consideration" in the *forum non conveniens* analysis, "weighs in favor of dismissal," and is a common basis for dismissal. [*Shin-Etsu Chem.*, 9 A.D.3d at 178](#). Accordingly, this factor weighs in favor of dismissal for a U.K. forum.

3. Litigation in New York Would Impose Substantial Hardships on Defendants

The predominance of foreign defendants also favors dismissal. [*Blueye Navigation, Inc. v. Den Norske Bank*, 239 A.D.2d 192, 192 \(1st Dep't 1997\)](#) (dismissal under *forum non conveniens* when defendants were foreign and all other factors point to England as the appropriate forum); [*Fernie v. Wincrest Cap. Ltd.*, No. 653282/2018, 2019 N.Y. Slip Op. 30510\(U\), at *6 \(Sup. Ct. N.Y. Cnty. Feb. 28, 2019\)](#).

In addition, the likely relevant documents and witnesses are mainly located in the United Kingdom—the place where the alleged mismanagement of Barclays PLC occurred. (R718-19, ¶¶4-10.) See [*Bewers v. Am. Home Prods. Corp.*, 99 A.D.2d 949, 950 \(1st Dep't 1984\)](#) (dismissing under *forum non conveniens* where "vast majority of witnesses" and "documentary evidence" were in England).

Plaintiff's choice of New York as a forum does not change this calculus. [CPLR 327\(a\)](#); *see also* [Citigroup Glob. Mkts, Inc. v. Metals Holding Corp.](#), 12 Misc. 3d 1168(A), 2006 N.Y. Slip Op. 51105(U), at *8 (Sup. Ct. N.Y. Cnty. 2006), *aff'd*, 45 A.D.3d 361 (1st Dep't 2007). Courts routinely dismiss cases brought by New York plaintiffs with "limited connection[s] between the other parties and the forum." [Citigroup](#), 2006 N.Y. Slip Op. 51105(U), at *8; *see also* [Silver v. Great Am. Ins. Co.](#), 29 N.Y.2d 356, 361 (1972) ("Although such residence is, of course, an important factor to be considered, forum non conveniens relief should be granted when it plainly appears that New York is an inconvenient forum and that another is available which will best serve the ends of justice and the convenience of the parties."); [Blueye Navigation](#), 239 A.D.2d at 192. Importantly, plaintiff's residence carries less weight here because "[i]n a stockholders derivative action . . . the real party in interest is the corporation," and "[o]ther stockholders of a multi-State corporation . . . could lay similar if not equal claim to maintenance of the suit in their home jurisdiction." [Bader](#), 66 A.D.2d at 645; *see also* [Koster v. \(Am.\) Lumbermens Mut. Cas. Co.](#), 330 U.S. 518, 524-25 (1947).²⁴

²⁴ Should plaintiff argue that defendants cannot assert a *forum non conveniens* defense because the motion to dismiss was brought by New York-based defendants on behalf of the foreign defendants, the trial court correctly concluded otherwise. (R47.) Pursuant to the so-ordered stipulation, the "phase 1" motion to dismiss raised global arguments affecting all defendants, including *forum non conveniens*. (R1133 n.7.) And plaintiff agreed that it would not argue that the fact that certain defendants did not join the motion was a basis to deny any phase 1 motion to dismiss. (*Id.*)

4. English Courts Provide an Adequate Alternative Forum

The availability of an adequate alternative forum—which is an “important factor”—weighs strongly in favor of dismissal. [*Pahlavi*, 62 N.Y.2d at 481](#). English courts provide a capable and suitable alternative forum. *See, e.g., Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 101 (2d Cir. 2000) (“We regard the British courts as exemplary in their fairness and commitment to the rule of law.”).

5. CPLR 327(b) Does Not Preclude Dismissal under New York’s *Forum Non Conveniens* Doctrine

Plaintiff’s claim that defendants are precluded “as a matter of law” from seeking dismissal based on *forum non conveniens* under [CPLR 327\(b\)](#) and [General Obligations Law §5-1402](#) (Br. 46) should be rejected for both procedural and substantive reasons.

From a procedural perspective, this argument is both unpreserved and relies on material improperly included in the Record on Appeal. In opposing defendants’ motion to dismiss, plaintiff failed to argue that Barclays PLC has “consented” to jurisdiction in New York and the application of New York law in any agreements. Plaintiff only attempted to raise this argument when seeking leave to file a sur-reply that was rejected by the trial court. (R1253-57.) Thus, on appeal, this argument is both waived and relies on materials that are not properly in the Record on Appeal. *See Nurlybayev*, 205 A.D.3d at 457 (plaintiff “failed to preserve his argument that

dismissal on forum non conveniens grounds was improper under [CPLR 327\(b\)](#) and [General Obligations Law §§5-1401](#) and [5-1402](#), as the argument was never made to the trial court” and the underlying agreement was not part of the record); (Mem. of Law in Supp. of Defendants-Respondents’ Mot. to Strike at 6-8, *Ezrasons, Inc. v. Rudd*, No. 2022-04657 (1st Dep’t March 13, 2023), NYSCEF No. 10).

In any event, plaintiff’s argument fails on the merits. First, plaintiff cannot rely on agreements to which it is not a party to invoke [CPLR 327\(b\)](#) and [GOL §5-1402](#). Those statutes were not intended to allow a nonparty to piggyback on the contracting parties’ agreement and force a contracting party to defend against noncontractual claims brought by unrelated third parties in New York court. *See* Memorandum of Legislative Representative of City of New York in Support of L. 1984, ch. 421, *in* 1984 N.Y. Sess. Laws ch. 421 (McKinney) (“The central premise of the proposal is that where parties at arms’ length agree to resolve disputes arising out of their contract in New York courts . . . then New York does have, by virtue of the mutual consent of all parties to the contract, significant contact with the parties and the underlying transactions.”). Indeed, decisions addressing [CPLR 327\(b\)](#) and [GOL §5-1402](#) confirm that plaintiff cannot invoke them here. For example, in [Freeford Ltd. v. Pendleton, 53 A.D.3d 32 \(1st Dep’t 2008\)](#), this Court reversed the denial of a motion to dismiss on *forum non conveniens* grounds, holding that “generally only parties in privity of contract may enforce terms of the contract

such as a forum selection clause found within the agreement.” *Id.* at 38 (emphasis added) (citing [ComJet Aviation Mgmt. LLC v. Aviation Inv’rs Holdings Ltd.](#), 303 A.D.2d 272 (1st Dep’t 2003)). Second, as discussed above, this action does not relate to or arise out of any of the agreements, many of which bind no defendant and do not contain the forum selection clauses that plaintiff claims. (*Supra* §II.A.2.)

III. IN ANY EVENT, BCI SHOULD BE DISMISSED

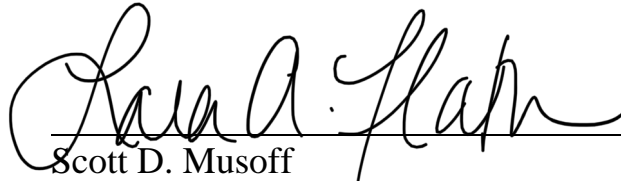
Even if this Court does not affirm dismissal of the Complaint in its entirety, it should affirm dismissal of BCI. Plaintiff admitted in the Complaint that it alleges no wrongdoing by BCI and seeks no damages from it. (R750-51, ¶32.) Nor does plaintiff allege any fiduciary duty that BCI owed that might give rise to a claim on behalf of Barclays PLC. Accordingly, all claims against BCI should be dismissed. *See Fletcher v. Boies, Schiller & Flexner, LLP*, 75 A.D.3d 469, 470 (1st Dep’t 2010) (claims dismissed where “[p]laintiff implicitly concedes that she pleaded no wrongdoing by” defendants).

CONCLUSION

The Court should affirm the Order dismissing the Complaint with prejudice.

Dated: March 13, 2023
New York, New York

SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP

A handwritten signature in black ink, appearing to read "Scott D. Musoff", written over a horizontal line.

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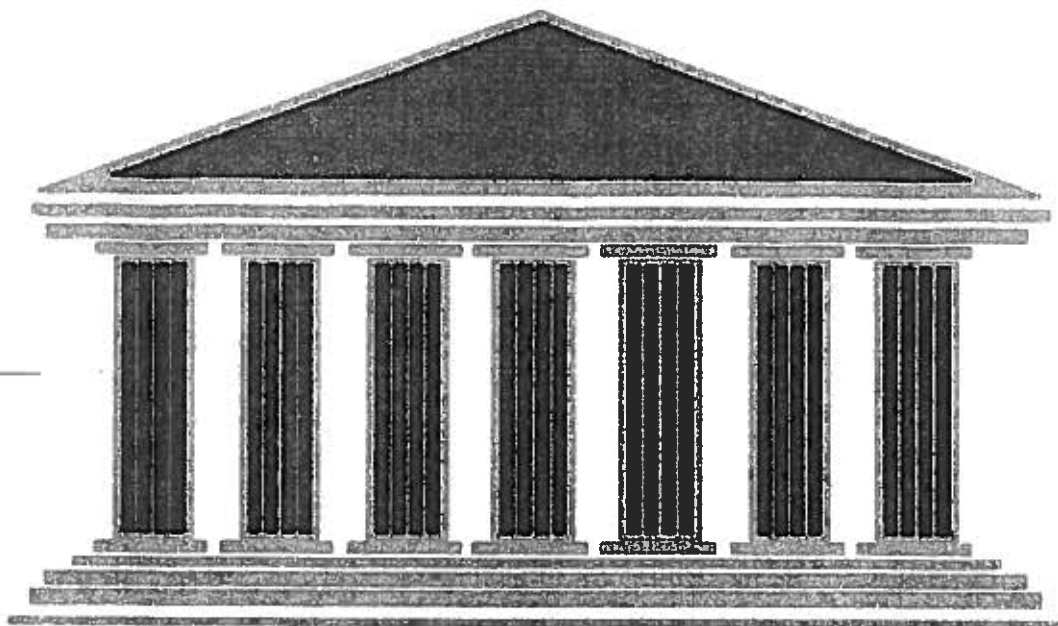
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ADDENDUM A



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APPROVAL # 139

CHAPTER

855

Print. 522, 4081

Intro. 522

IN SENATE

(Profiled)

January 4, 1961

Introdu-
tion

SECTION—(on recommendation of the Joint
Study Revision of Corporation Law)
d printed, and when printed as amended
on Corporation Committee
printed as amended and reprinted

SECTION
N ACT

Notes

OK

Pg. 102- line 19- Engrossed copy
changed to "or of a Committee"
Printed copy reads "or of a
Committee"

OK

pg 188- line 7- printed reads "permit
examination - engrossed reads - "permit
such examination"

OK

pg - 190- line 4- printed reads "section 522."
conferred by Engrossed reads "section 519"
typing - Ciovan - [initials]

William - O' Brady
Maline - Limony - Argo - Jeffers.

NEW YORK STATE LIBRARY

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PRINT NO. 4061

INTRO. NO. 522

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☒ Attorney General
☒ Budget
☒ Comptroller

☒ Ag. & Markets
☒ Banking
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☒ Joint Legis. Comm. on

Corporation Law
Revision
(Senator Anderson)

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WESTERN UNION

S-522 TELEGRAM

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1201 (4-00)

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SYB177

SY NB337 PD=HUX NEW YORK NY 7 NFT=

HON ROBERT MACCRATE=

1961 APR 7 PM 2 06

ELEGUTIVE CHAMBER STATE CAPITOL ALBANY NY =

NEW YORK UNIVERSITY SCHOOL OF LAW STRONGLY URGES
GOVERNORS APPROVAL OF NEW BUSINESS CORPORATION CT
SENATE INTRODUCTORY NUMBER 522 AND 522 AND ASSEMBLY
INTRODUCTORY NUMBER 885=

ACTING DEAN NEW YORK UNIVERSITY SCHOOL OF
LAW.

194

THE COMPANY WILL APPRECIATE SUGGESTIONS FROM ITS PATRONS CONCERNING ITS SERVICE

School of Law

F O R D H A M U N I V E R S I T Y *New York 7, N. Y.*

Office of the Dean

April 5, 1961

5523

The Honorable Robert MacCrate
Executive Chamber
State Capitol
Albany 1, New York

Re: Senate Intro. 522, Print. 522,4061

Dear Mr. McCrate:

I have discussed the new Corporation Law with Professors Kessler and Fogelman of this faculty, both of whom teach Corporation Law. Naturally, with a statute as broad and lengthy as this one is, no law teacher could be expected to agree with all of the phraseology or even all of the sections. We do have some reservations with respect to those sections governing foreign corporations.

After considerable thought and discussion it is my own view that inasmuch as the legislation does not become effective until April 1963, it should be enacted. There will certainly be opportunity before the next session of the legislature for any serious criticism to take further form and be handled by appropriate amendment.

We all feel that this draft is certainly better than prior drafts and further that there is an overall improvement in the law of corporations. Hence, rather than jeopardize the general progress which has been made, I would prefer to have it enacted.

If experience should show that there are inequities, I am sure that subsequent amendment can cure them.

Sincerely yours,



William Hughes Mulligan
Dean



THE SENATE
STATE OF NEW YORK
ALBANY

WARREN M. ANDERSON
47th DISTRICT
CHAIRMAN
COMMITTEE ON CORPORATIONS

5522

7th FLOOR
SECURITY MUTUAL BLDG.
BINGHAMTON, NEW YORK

April 3, 1961

Hon. Robert MacCrate
Executive Chamber
State Capitol
Albany 1, N. Y.

Re: Business Corporation Law, Senate Int. #522,
Pr. #4061; Assembly Int. #885, Pr. #5310

Dear Bob:

In anticipation of your request for my comments and that of the Joint Legislative Committee to Study Revision of Corporation Laws, I instructed our counsel, Robert Leshner, to forward to you a memorandum of this bill. This document was forwarded on March 29th and outlines in some detail the approach taken by our committee in developing the bill and outlines its principal provisions.

The bill, as you know, is the result of some four and a half years of research, study and consultation with the organized bar, business and labor groups, representatives of accounting profession, corporate representatives, corporate secretaries, the Attorney General's office, the Secretary of State's office and the Department of Taxation and Finance. The effective date of the bill is April 1, 1963. This date was set to provide ample opportunity for all interested groups to make a thorough study of the bill prior to it becoming operative and to permit the various business corporations two annual meetings in which to bring their by-laws in conformity with the new law.

Our Joint Committee has been continued by the Legislature and has been provided with ample funds to carry on an extensive re-examination and re-evaluation of the bill and it is our intention to do so. It is my personal feeling that the work of focusing attention on areas that may need revision is improved if the bill has in fact been signed into law.

Hon. Robert MacCrate

-2-

April 3, 1961

It is, therefore, my recommendation that the bill be approved.

If, in fact, the bill is to be signed, I request that Assemblyman Robert Brook and I be permitted to be present.

Sincerely yours,

A handwritten signature in cursive script, appearing to read "Warren".

WMA:sk



STATE OF NEW YORK
DEPARTMENT OF LAW
ALBANY

LOUIS J. LEFKOWITZ
ATTORNEY GENERAL

5522

MEMORANDUM FOR THE GOVERNOR

Re: Senate Int. 522, Pr. 522, 4061

This bill enacts the Business Corporation Law and, to the extent provided therein, supersedes the provisions of the Stock Corporation Law and the General Corporation Law.

This bill was enacted on recommendation of the Joint Legislative Committee to Study Revision of Corporation Laws.

The effective date is April 1, 1963.

It constitutes the first major revision of laws dealing with business corporations. To some extent it relaxes the restrictions upon corporations and corporate management and, in other respects, it clarifies existing language.

I find no legal objection to this bill.

Respectfully submitted,

Dated: April 7, 1961

Louis J. Lefkowitz
LOUIS J. LEFKOWITZ
Attorney General



JOSEPH H. MURPHY
COMMISSIONER OF TAXATION AND FINANCE
PRESIDENT TAX COMMISSION

STATE OF NEW YORK
DEPARTMENT OF
TAXATION AND FINANCE
ALBANY

April 3, 1961

S 522

The Honorable Nelson A. Rockefeller
Governor of New York
State Capitol
Albany, New York

In re: Senate bill Int. No. 522, Pr. No. 4061

Dear Governor:

This is in reply to your request for my comments on the above bill, which is in your hands for action. It would enact a new Business Corporations Law; a copy is enclosed for convenient reference.

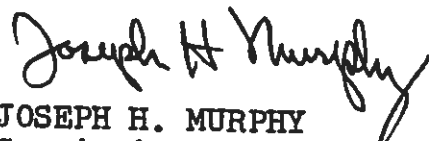
For the most part the subject matter of this bill is not within the purview of this Department, and I will limit my comments to section 1312 of the proposed new statute, which deals with foreign corporations doing business in this State without having obtained a certificate of authority.

A foreign corporation incurs liability for New York tax by doing business in this State, regardless of whether or not it obtains a certificate of authority, but the State Tax Commission ordinarily has no knowledge or notice of a foreign corporation's activities or tax liability until either the filing of a tax return or the receipt of a notice from the Department of State that a certificate of authority has been issued. Many foreign corporations which would otherwise attempt to conceal their tax liability by failing to apply for a certificate of authority, are induced to apply for such a certificate only by the statutory penalties for noncompliance. At present section 218 of the General Corporation Law provides that a foreign corporation doing business in New York may not maintain any action in this State upon a contract made in this State, unless it had obtained a certificate of authority before the contract was made.

Section 1312 of the new Business Corporations Law would eliminate the provision that a certificate of authority must have been obtained before the contract was made, and would substitute a provision that the certificate must be obtained, and all taxes and penalties previously incurred must be paid, before suit is commenced. If a foreign corporation seeks to evade payment of New York taxes, this provision supplies comparatively little inducement for it to disclose its tax liability by applying for a certificate of authority. It may do business in this State for an extended time without a certificate and without paying New York tax, hoping that no suit on a contract in a New York court will be necessary. It will know that, if such a suit should become necessary, it can retroactively validate its prior contracts by obtaining a certificate before commencing the suit. The only risk incurred by such a course will be the risk of penalties which may be assessed for failure to file returns and pay taxes when they become due.

In my opinion, this change might increase the possibility of tax evasion by foreign corporations and might cause some revenue loss, although I am unable to give you any estimate of the amount. In view of the salutary purposes to be served by this bill, this objection would not justify a veto, particularly since your decision must be based upon the over-all effect of the bill and not upon the effect of one rather unimportant section. However, if the bill receives executive approval, this Department will attempt to check its revenue effect, and, if it appears that a substantial loss of revenue results, will propose an appropriate amendment.

Sincerely,


JOSEPH H. MURPHY
Commissioner

E R .

OFFICE OF
THE INDUSTRIAL COMMISSIONER
NEW YORK

5527

DEPARTMENT OF LABOR

April 5, 1961

SENATE

Int. 522
Pr. 4061

Introduced by:

Mr. Anderson, on the recommendation of the
Joint Legislative Committee to Study
Revision of Corporation Laws.

RECOMMENDATION:

Approval:

STATUTES INVOLVED:

General Corporation Law and Stock Corporation Law,
various sections.

EFFECTIVE DATE:

April 1, 1963.

DISCUSSION:

1. Purpose of bill:

To consolidate various provisions in the General Corporation Law
and the Stock Corporation Law into a new Business Corporation Law.

2. Summary of provisions of bill:

Enacts a new Business Corporation Law to apply to profitmaking corporations;
law includes provisions relating to incorporation, financing, rights of
shareholders, duties of directors and officers, mergers and consolidations,
and dissolutions of business corporations.

The bill's provisions relating to the following two areas are of special
concern to the Department of Labor:

1. Approval by Board of Standards and Appeals

Section 301, subd. 6 of the bill requires the approval of the State
Board of Standards and Appeals for the incorporation of an organization
that contains in its name the words "union", "labor", "council", or
"industrial organization" in the context which indicates or implies
that it is an organization of working men, or for the performance of
services as labor or management consultant, or arbitrator in labor-
management disputes. The Section does not contain standards for such
approval, nor does it specifically authorize the Board of Standards
and Appeals to inquire into the purposes of the organization and to
hold hearings.

At present, Section 9-a of the General Corporation Law and Section 11
of the Membership Corporations Law require approval of the Board of
Standards and Appeals for the incorporation of labor organizations.
Under the General Corporation Law approval is required for the incorpo-
ration of an organization which has as its purpose the formation of an
organization of working men, or uses in its name such terms as "labor",
"union", or "union labor council". Under the Membership Corporations
Law approval is required for the incorporation of an organization of
workers for their mutual advancement. Both the General Corporation Law

S.I. 522
S.P. 4061

and the Membership Corporations Law specifically authorize the Board of Standards and Appeals to inquire into the purposes of the proposed corporation and to hold hearings to determine whether the purposes of the proposed corporation are consistent with public policy and the Labor Law.

2. Liability of Stockholders for wages

Section 630 of the bill provides for the liability of shareholders for wages due to laborers, servants, or employees. The liability would apply only in cases where the stock of the corporation is not traded on national securities exchanges or over-the-counter markets; liability would be limited to the ten largest shareholders; and a shareholder who has paid more than his pro rata share would be entitled to a pro rata contribution from the other shareholders liable under the section.

Section 71 of the Stock Corporation Law now makes every stockholder of every stock corporation jointly and severally liable for unpaid wages.

3. Prior legislative history of bill and similar proposals:

Unknown.

4. Known position of others respecting bill:

The Joint Legislative Committee to Study Revision of Corporation Laws and the Department of State favor this proposal.

5. Budget implications:

Unknown.

6. Arguments in support of bill:

The bill will present in one place and in a clear and logical manner provisions relating to business corporations. It will eliminate obsolete and overlapping provisions in the General Corporation Law and in the Stock Corporation Law. In addition, the provisions relating to the liability of stockholders represent a compromise solution to a matter which has long been the subject of discussion.

7. Arguments in opposition to bill:

Although Section 301, subd. 6 of the bill requires the approval of the Board of Standards and Appeals for certain corporations, the section fails to provide standards for such approval, and fails to give the Board of Standards and Appeals the statutory right to conduct an inquiry and hold hearings to determine whether the purposes of the proposed corporation

are in all respects consistent with public policy. Early court decisions held that the power of the Board of Standards and Appeals to approve certificates of incorporation is "ministerial". (Hagen v. Picard, 1939, 171 Misc. 475, 12 N.Y.S. 2d 873, aff'd, 1939, 258 App. Div. 771, 14 N.Y.S. 2d 706.) As the result of these decisions Section 9-a of the General Corporation Law and Section 11 of the Membership Corporations Law were amended in 1941 to specifically give the Board of Standards and Appeals the right to inquire into the purposes of the proposed corporation and to hold hearings to determine whether the purposes of the proposed corporation are in all respects consistent with public policy and the Labor Law.

It should be noted, moreover, that the effect of the proposed bill would be to delete the requirement of approval by the Board of Standards and Appeals for the incorporation of a non-profit organization that uses in its name such terms as "labor" but whose purposes are not to improve employee conditions. For example, a group of union employees could incorporate as a social organization under the Membership Corporations Law and use the name of their own union for this purpose without obtaining approval of the Board of Standards and Appeals. Thus, the union which may enjoy great prestige would not have an opportunity to be heard on the issuance of a certificate of incorporation to a small group of its members. The use of the union name by the social organization would result in confusion. It may be mentioned that the Board's power to approve incorporations of labor organizations has been an important means of protecting the public and the legitimate trade union movement.

With reference to the liability of stockholders for unpaid wages, objections may be raised to the exclusion of corporations whose stocks are traded on national exchanges or on over-the-counter markets.

8. Reasons for recommendation:

Only two sections of this voluminous bill, which has been the subject of study for five years, is of direct concern to the Department of Labor. The bill will not go into effect until April 1, 1963, and if it is approved, omissions can be corrected during the 1962 and 1963 legislative session.

Respectfully submitted,


Industrial Commissioner

30-DAY BILL
BUDGET REPORT ON BILLS

Session Year: 1961

SENATE

Pr: 4061

Int: 522

Introduced by:

Mr. Anderson

ASSEMBLY

Pr:

Int:

Law: Business Corporation (new) Sections:

Subject and Purpose: In relation to business corporations constituting chapter four of the consolidated laws.

Division of the Budget recommendation on the above bill:

Approve: _____ Veto: _____ No Objection: _____ No Recommendation: X

Reasons:

Purpose and provisions: This bill creates the new Business Corporation Law to take effect April 1, 1963. It consolidates all the existing laws and adds new provisions relating to incorporation, financing, rights of shareholders, duties of directors and officers, and mergers and consolidations of business corporations generally.

This bill was filed on recommendation of the Joint Legislative Committee to study Revision of Corporation Laws. The source of the provisions of the new law and comments on each section are contained in the supplement to the fifth interim report to the 1961 session of the Legislature submitted by that body (see Legislative Document No. 12, 1961).

Recommendation: According to our review of the bill, we find that the new law will have a negligible effect on administrative costs of the Department of State. In view of our lack of competence on the technical aspects of the bill, however, we make no recommendation.

Date: April 10, 1961

Examiner: T.N. Hard

Disposition:

Chapter No:

George O. Von Frank

Veto Date:

EDMUND F. WAGNER, President
J. MARK HIEBERT, Vice President
ROBERT C. TYSON, Vice President
J. HUBER WETENHALL, Vice President
H. C. TURNER, JR., Treasurer



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ARNOLD WITTE, Secretary

COMMERCE AND INDUSTRY ASSOCIATION OF NEW YORK INCORPORATED

99 CHURCH STREET • NEW YORK 7, N. Y.

Cable Address COMINDASSN • Telephone Rector 2-5200

April 4, 1961

Hon. Robert MacCrate
Counsel to the Governor
Executive Chamber
Albany 1, New York

Re: S. Int. 522, Print 4061 -
Anderson
APPROVED IN PRINCIPLE

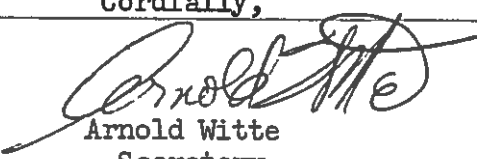
Dear Mr. MacCrate:

We have not completed a thorough review of this last extensive revision of the proposed new business corporation law for the State and, therefore, must confine ourselves at this point to an approval in principle.

It is a source of great satisfaction to us to note that the measure as finally passed by the Legislature reflects some 28 out of 32 recommendations formally made by this Association and many others submitted on an informal basis. We are particularly pleased to note the elimination of some of the inequities in the present law, such as the restrictions on suits by foreign corporations based on contracts made in New York State before authorization to do business, and the limitless liability for wages provided under present Section 71, SCL.

The bill represents a monumental effort by a dedicated Joint Legislative Committee and a tireless and cooperative staff of specialists. In endorsing their product we salute each and all of those who have contributed to its ultimate fabrication.

Cordially,


Arnold Witte
Secretary

AW:MMD

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International Business Machines Corp.
BURTON A. ZORN, Proskauer Ross Goetz & Mendelsohn

MEMORANDUM TO MR. MacCRATE

FROM: Kent H. Brown
Counsel, Pub. Ser. Comm.

8522
DATE: March 31, 1961

RE: Senate Int. 522, Pr. 522, 4061 BY: Mr. Anderson

AN ACT
in relation to business corporations, constituting
chapter four of the consolidated laws

RECOMMENDATION: None

DISCUSSION: Careful perusal of this voluminous bill discloses no matters of interest or concern to this Commission. So far as I have been able to decipher, it has no impact upon the requisites for security issuance, etc., etc., by corporations subject to our jurisdiction, contained in the Public Service Law and correlative provisions of the Transportation Corporations Law, the Railroad Law, and the Stock Corporations Law.

25



G. RUSSELL CLARK
SUPERINTENDENT OF BANKS

STATE OF NEW YORK
BANKING DEPARTMENT
100 CHURCH STREET
NEW YORK 7, N. Y.

April 5, 1961

55-22

BANKING DEPARTMENT
MEMORANDUM ON
BILL BEFORE THE
GOVERNOR FOR
EXECUTIVE ACTION

SENATE

Int. 522

Pr. 4061

ASSEMBLY

Introduced by:

Mr. Anderson

RECOMMENDATION:

Approval

STATUTES INVOLVED:

Business Corporation Law (new)

EFFECTIVE DATE:

April 1, 1963

DISCUSSION:

1. Purpose of bill:

To enact a new chapter to govern business corporations.

2. Summary of provisions of bill:

The bill would add to the Consolidated Laws a new chapter, to be known as the "Business Corporation Law", which would comprise the entire body of statutory corporate law governing business corporations generally. For corporations to which it applies, the new chapter would replace the General Corporation Law and the Stock Corporation Law and those laws would no longer apply to such corporations (§103(a), §103(e)).¹

¹ Citations in this form refer to sections of the proposed new chapter.

The new chapter would apply to domestic corporations and foreign corporations authorized to do business or doing business in this state, but not to other corporations except where specifically so provided (§103(a)). The only corporations falling within the definitions of "domestic corporation" or "foreign corporation" are corporations for profit formed for purposes for which a corporation could be formed under the new chapter (§§102(a)(4), 102(a)(7)). A corporation could be formed under the new 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" (§201(a)). (Since banking organizations are formed only under the Banking Law, a corporation could not be formed under the new chapter to engage in the business of any banking organization. Thus a banking organization or foreign banking corporation would not fall within the definition of "domestic corporation" or "foreign corporation" and would not be subject to the new chapter. Since the bill would not repeal the General Corporation Law or Stock Corporation Law, those statutes would continue to govern banking organizations and foreign banking corporations).

The new chapter embodies an extensive general redraft and amendment of the laws it is designed to supplant. Some of the changes seem to be of a substantive nature. Since it is assumed that the drafters have furnished a detailed explanation of the changes, and since time does not permit, we will not attempt such an explanation here.

3. Prior legislative history:

A similar bill introduced in 1960 (Senate Intro. 3124, Print 3316 [Mr. Anderson]) was never reported out of committee.

4. Known position of others respecting bill:

The bill is sponsored by the Joint Legislative Committee to Study

Revision of Corporation Laws.

5. Budget implications:

None.

6. Arguments in support of bill:

This Department has no special competency to comment upon the merits of the bill and has not in the time available been able to undertake a detailed analysis of its provisions. Counsel to the Banking Department have, however, studied generally the bill and the reports issued by the drafters. Based upon this general study, counsel consider the proposed new chapter to be an extremely well-drawn statute, which would greatly improve the statute law of this state in the area in question. Counsel have noted no specific defects although it is recognized that improvements in some details may be possible.

Since the chapter would not affect the laws governing corporations formed under the Banking Law, this Department would not be directly affected by its enactment. The delayed effective date should afford ample further opportunity for interested persons to suggest changes and for the legislature to act to correct any defects. If enacted into law, the bill will receive wider distribution and public attention than would otherwise be the case and thus make it more likely that any defects will be noticed. This Department plans a detailed study with a view to determining whether any provisions of the Banking Law should be amended to conform with or refer to the new chapter instead of the existing corporate statutes. In the course of this study we will suggest such amendments to the new chapter as to us seem needed.

For the foregoing reasons, although we are not now in a position either to endorse the bill in every detail or to raise specific objections, we regard its enactment as a desirable forward step toward a marked improvement in the laws of this state governing business corporations.

7. Arguments in opposition to bill:

None known at present.

8. Reasons for recommendation:

See 2. and 6., above.

THE ASSOCIATION OF THE BAR
OF THE CITY OF NEW YORK
42 WEST 44TH STREET

COMMITTEE ON STATE LEGISLATION

Chapter 835

SHELDON OLIENSIS, CHAIRMAN
425 PARK AVENUE
NEW YORK 22, N. Y.
PLAZA D-8400

S. 522

April 19, 1961

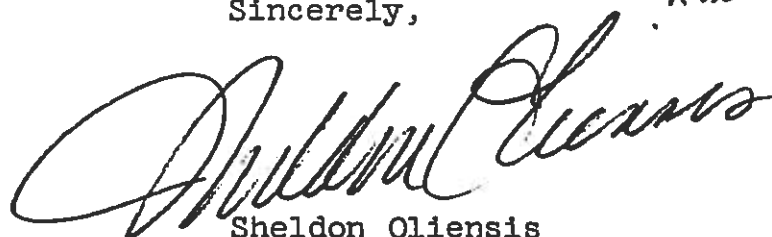
Re: S. Int. 522, Pr. 522

Dear Mr. MacCrate:

This bill would effect a comprehensive revision of the New York Corporation laws. The Committee on Corporate Law of this Association, in conjunction with the Committee on Corporation Law of the New York State Bar Association has issued a joint report with respect to this bill, and we enclose a copy herewith.

Jan 25, 1961 - opposition later withdrawn RSN

Sincerely,



Sheldon Oliensis
Chairman

Enclosure

Honorable Robert MacCrate
Executive Chamber
State Capitol
Albany 1, New York

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.

The work was commenced with high hopes that New York would take its rightful place in the forefront of states having up-to-date legislation conducive to domestic enterprise and inviting to business enterprises from other states. These hopes have not been realized, and, unless the Bill is substantially amended along the lines indicated in this Report, we oppose its enactment as being an unsatisfactory substitute for the existing corporation laws. It is our view that, if the Bill were to be enacted in its present form, there would be a great reluctance to form new corporations in New York and, more important, we believe that some corporations now incorporated in New York would seek re-incorporation elsewhere. We also believe the Bill would retard qualifications in New York by foreign corporations.

This Report will be presented at the public hearing on the Bill to be held on January 31, 1961 in Albany by the Joint Legislative Committee, the Senate Committee on Corporations and the Assembly Judiciary Committee. In addition, we are now at work on a supplement to this Report which will incorporate revisions in form as well as substance which in our view should be made if the proposed law is to be a reasonably workable statute for the business community and the people of the State of New York.

For the purposes of this Report references to the "Bill", without qualification, mean the Bill introduced on behalf of the Joint Legislative Committee to Study Revision of Corporation Laws, pre-filed on December 16, 1960 as of January 4, 1961 (1961 Senate Int. 522, Print 522; Assembly Int. 885, Print 885). References to articles or sections in this Report, not otherwise qualified, refer to this Bill. References to the "1960 Study Bill" mean the previous bill which was introduced on February 15, 1960 on behalf of the Joint Legislative Committee (1960 Senate Int. 3124, Print 3316).

References in this Report to the "Model Act" refer to the 1953 Revised Edition of the Model Business Corporation Act prepared by the Committee on Corporate Laws of the American Bar Association and published by the Committee on Continuing Legal Education of the American Law Institute, as further revised in 1955, 1957 and 1959, such further revisions being contained in a 1959 Cumulative Addendum. A three volume annotation of the Model Act has recently been published by the American Bar Foundation, which contains the Model Act as revised through 1959.

Where general references are made to the "existing corporation laws" these refer to the General Corporation Law and the Stock Corporation Law.

What follows in this Report is a general review of the important substantive changes which our two Committees believe should be made in the Bill. In the interests of brevity, generally our comments are confined to those particulars of the Bill which we feel need to be changed. The views expressed in the Report are concurred in by the great majority of the members of both of our Committees unless otherwise indicated. In a few instances individual members may not agree with particular statements in the Report and reserve the right to record their dissent, if the occasion to do so should arise.

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 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.

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.

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

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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JOINT LEGISLATIVE COMMITTEE
TO STUDY REVISION OF CORPORATION LAWS

EXPLANATORY MEMORANDUM ON BUSINESS CORPORATION LAW

(Senate Int. #522, Pr. #4061
Assembly Int. #885, Pr. #5310)

March 13, 1961

ARTICLE I

(SHORT TITLE; DEFINITIONS; APPLICATION; CERTIFICATES; MISCELLANEOUS)

Article 1, entitled "Short Title; Definitions; Application; Certificates; Miscellaneous", is composed of twelve sections.

Section 101 designates the chapter as the "Business Corporation Law".

Section 102 contains definitions of a number of terms. The more significant definitions, new to New York corporation statutes but in most cases incorporating generally accepted meanings, relate to corporate finance terms used in Article 5, e.g., "bonds", "capital surplus", "earned surplus", "insolvent", "net assets", "stated capital", "surplus", "treasury shares". Preciseness of terminology implements the distinction drawn in Article 5 for certain purposes between capital surplus and earned surplus and the protective provisions referring to "insolvency" (defined in "equity" rather than "bankruptcy" sense). For ease of reference, "corporation" and "domestic corporation" are defined to mean a corporation for profit formed under the chapter or existing on its effective date and formed under any

other New York statute for a purpose or purposes for which a corporation may be formed under the chapter (see §201). "Foreign corporation" is defined to mean a corporation for profit formed under laws other than any New York statute for a purpose or purposes for which a corporation may be formed under the chapter. A new concept of a "domiciled foreign corporation" is brought into the proposed law in this definition by a cross reference to section 1317 wherein the characteristics of that category of foreign corporations are set out.

Section 103 provides that the chapter applies to every domestic corporation and, to the extent provided in Article 13, to every foreign corporation. Article 13, entitled "Foreign Corporations", includes or makes cross-reference to the provisions applicable to foreign corporations including the defined category of domiciled foreign corporations. The chapter applies to commerce with foreign nations and among the several states, and to federally-formed corporations, only to the extent permitted under the Constitution and laws of the United States.. Expressly made inapplicable to any domestic corporation or foreign corporation to which the chapter applies are the General Corporation Law and the Stock Corporation Law. After the effective date of the chapter, no corporation may be formed under the Stock Corporation Law unless a New York statute other than the Stock Corporation Law permits its formation under the Stock Corporation Law.

The authority of the Attorney-General to take proof under section 406 of the Civil Practice Act in connection with any proposed action or special proceeding under the chapter, is specifically covered in section 109.

Among the miscellaneous provisions are those, several of them new to New York corporation statutes, defining the contents, signing, filing, effectiveness, correction, and evidentiary effect of any certificate or other instrument filed by the department of state relating to any domestic or foreign corporation. The inclusion of such general provisions makes possible the avoidance of considerable repetitive language in various later sections of the chapter.

ARTICLE 2

(CORPORATE PURPOSES AND POWERS)

Article 2, entitled "Corporate Purposes and Powers", is composed of three sections: §201 (Purposes), §202 (General powers), and §203 (Defense of ultra vires).

Paragraph (a) of section 201 provides that a corporation may be formed under the chapter for any lawful business purpose or purposes except to do in New York any business for which formation is permitted under any other New York statute unless such statute permits formation under the chapter. In effect, this section

restates present New York law, under which various types of domestic stock corporations other than business corporations are formed under statutes other than the Stock Corporation Law. Purposes unlawful for business corporations are proscribed by various statutes. Section 103(e) provides that after the effective date of the chapter no corporation shall be formed under the Stock Corporation Law unless a New York statute other than the Stock Corporation Law permits its formation under the Stock Corporation Law, thus barring the formation of business corporations under that statute.

Paragraph (b) of section 201 has no counterpart in present New York law. It, in effect, would broaden purposes during war or other national emergency, when amendment of the purpose clause of the certificate of incorporation might be difficult. It is limited by the requirement of request or direction of any competent governmental authority.

Section 202 constitutes an enumeration of general corporate powers consolidated from scattered statutory provisions and decisional law. Such powers are expressly stated to be subject to any limitations prescribed by the chapter or any other New York statute or the corporation's certificate of incorporation, and to exist in furtherance of the corporation's purposes.

Among the enumerated general corporate powers are powers to make donations irrespective of corporate benefit (§202(a)(12)); to pay pensions and have various retirement, incentive and benefit plans, trusts and provisions for directors, officers and employees (§202(a)(13)); to acquire, hold, and

dispose of the corporation's own shares (§202 (a)(14)); to be a partner (general, limited or otherwise) to the extent permitted by applicable partnership law (§202(a)(15)).

Section 203 has no counterpart in existing New York statutes. It largely codifies New York decisional law delimiting the defense of ultra vires. It distinguishes between purported corporate action in excess of corporate purposes (see §201) or powers (see §202) and illegality of any action, and does not apply to the latter. Section 203 changes New York decisional law by sustaining devises and bequests to corporations beyond their power to take and with respect to ultra vires contracts wholly executory on both sides by making the defense of ultra vires unavailable to the parties. Actions or special proceedings by the attorney-general to annul or dissolve a corporation or to enjoin it from the doing of unauthorized business are unaffected by section 203.

ARTICLE 3

(CORPORATE NAME AND SERVICE OF PROCESS)

Article 3 covers the subjects of Corporate Names and Service of Process as to both domestic and foreign corporations.

The sections presently in the General Corporation Law referring to corporate names require complete revision. The new sections are geared to names of business corporations. Words and terms relating to non-profit corporations are omitted. In lieu of the provisions requiring inclusion of any word which would indicate corporate character, the section sets forth words which clearly identify the entity as a corporation.

The provision presently in Gen. Corp. L. section 9 refers to names "calculated to deceive". This concept has been changed to include a conflict by confusion not necessarily deceptive.

A provision prohibiting the use of deceptive words has been inserted for the protection of the public. A corporation will not be permitted to do business under a name which would imply that it is formed for a purpose prohibited to business corporations or not authorized by its certificate of incorporation.

The use of derivatives of restricted or prohibited words in corporate names is made subject to the same restriction or prohibition to prevent circumvention of the intent of the statute.

The secretary of state is permitted greater discretion to accept applications from foreign corporations established in their home states for many years under names similar to those of existing corporations. The section provides, however, that such corporations will not be granted authority where the use of the name may be confusing or deceiving.

Names of existing corporations are not affected by the chapter.

A much needed change is the inclusion of a section on reservation of names. The provision is essential to modern business which frequently requires authorization in more than one state. The reservation period is required so that the corporation may inquire of the various states as to the availability of its proposed corporate name and complete the procedures for incorporation, authorization or change of name required by the different jurisdictions. A corporate name may be reserved for a period of sixty days

for certain designated purposes including prospective incorporation or application for authority, or for change of name. Under the present statute reservation is permitted only for change of name. The chapter permits two extensions of the reservation period.

The chapter retains the provision requiring the designation of the secretary of state as the corporation's agent for service of process for both domestic and foreign corporations.

Corporations are permitted but not required to designate an additional agent. Should the agent resign he is required to notify his principal. The agent can be removed at will and a new agent designated by the corporation. The public and creditors of the corporation are protected by the inclusion of a provision that the resignation and the removal are effective thirty days after filing.

Process may be served on the registered agent in the same manner as on an individual defendant.

Service on the secretary of state is made in the same manner as is presently set forth in the statute. The chapter combines the sections relating to service of process on domestic and foreign corporations.

A new section has been included permitting service on the secretary of state as statutory agent of unauthorized foreign corporations transacting business in this state. This is a necessary protection for our citizens. The manner of affecting the service is precise and definitely set forth. The statute permits personal service without the state and service through the mails.

The department of state is required to keep a record of each service and will upon request issue certificates attesting to the receipt of the process.

ARTICLE 4 (FORMATION OF CORPORATIONS)

This article is entitled "Formation of Corporations" and covers the qualifications of incorporators, the contents, filing and effect of the certificate of incorporation and the conduct of the organization meeting.

One or more natural persons of the age of twenty-one years or over may act as incorporators (§401). This section simplifies the present law by eliminating the requirements that incorporators be citizens or residents, that there be at least three of them and that they all be subscribers for shares. The simplified requirements reflect the realities of modern corporate practice.

Section 402 prescribes the contents of the certificate of incorporation. This section is substantially a restatement of the present law, but it has been simplified by eliminating statements of the names and address^{es}/of the subscribers and initial directors. Modern corporate practice has made such statements obsolete by the use of dummy subscribers and directors. Further simplification of the certificate of incorporation is permitted by the provisions that the duration of the corporation need be stated only if it is other than perpetual, and that the general corporate

powers listed in Article 2 need not be set forth in the certificate. The law is clarified by setting forth in one section all requirements as to the contents of a certificate of incorporation instead of referring to other sections as does the present statute. Great flexibility is permitted in the inclusion of other lawful provisions desired by the incorporators in order to accommodate the diversified needs of particular corporations and types of corporations. This is of particular importance to closely held corporations.

Section 403 changes the present statute by providing that the certificate of incorporation, after it has been filed by the department of state, shall be conclusive, rather than presumptive, evidence that all conditions precedent have been fulfilled and that the corporation is formed under this chapter. This rule does not, however, apply to actions or special proceedings brought by the attorney-general against the corporation. The attorney-general is given by section 403 the power to maintain an action to annul or dissolve the corporation under Article 11 or to enjoin any person from acting as a corporation within this state without being duly incorporated. The de facto doctrine found in New York case law is, in substance codified by this section.

The organization meeting of the incorporators is covered by §404. It has no counterpart in the present statute, but reflects the modern corporate practice. The provisions of this section are very simple and flexible and provide a useful guide to proper corporate procedure.

ARTICLE 5 (CORPORATE FINANCE)

The grouping of the principal topics of corporate finance, at present scattered through the Stock Corporation Law

and one section of the Penal Law, into a single article is an innovation that has permitted condensation and general improvement of the text of the chapter to meet modern conditions.

Existing law relating to stocks and bonds as instruments for raising financial capital, has been retained with a few changes. One of these is expansion of the power of directors to allocate, as between stated capital and surplus, the consideration received for shares without par value (§506(b)); another permits corporations at their option to grant voting rights to bondholders (§518(b)). Technical improvements provide for irrevocable subscriptions for shares of a corporation to be formed (§503(a)), expand the range of expenditures that may be paid or allowed out of the consideration received for shares without impairing their fully-paid status (§507), and offer great flexibility in dealing with fractions of shares or scrip (§509). Increased protection for investors results from a new provision deferring the issue of stock certificates until after the consideration for shares has been fully paid (§504(h)), except as provided with respect to share options granted to directors, officers or employees (§505(e)).

The provisions on convertible securities have been consolidated and simplified (§519), while the subject of redeemable shares has been more fully developed (§512) than in existing law, including a provision for redeemable common shares in certain cases. The chapter encourages the incorporation in New York of investment companies subject to federal regulation (§512(b)).

Adoption of stock-option plans as incentives for employees has been facilitated by eliminating rights of dissenting share-

holders to receive payment for their shares, but approval of the plan must be obtained from both a majority of all the shareholders and the shareholders, if any, having preemptive rights in the shares to which the options pertain (§505(d)).

Statutory recognition has been given to stock-purchase agreements (§514), treasury shares (§515), and share distributions to shareholders (§511). The chapter avoids using the term "stock dividend," which is variously interpreted by the courts and the financial community, and requires disclosure by the corporation as to the effect if then determinable of any share distribution upon its stated capital and earned or capital surplus (§511(f)).

There is no basic change in the present law that permits dividends in cash or property to be paid out of any surplus, including unrealized appreciation of assets (§510). However, in view of the widespread practice of creating large surpluses by the issue of shares with nominal par or stated values, two provisions have been added:

First, for the protection of creditors and of directors who may act without advice of counsel, the new bill specifically prohibits cash or property dividends when the corporation is unable to pay its debts in the usual course of business (§510(a)). The principle of this prohibition, logically implied in any reasonable system of limited liability for shareholders, is also found in the section dealing with repurchase or redemption of the corporation's own shares (§513). The harsh provision of the present corporation law (S.C.L. §15) relating to transfer of assets of an insolvent corporation to its officers, directors, shareholders or creditors has been eliminated.

Second, for the protection of shareholders, the corporation is required to disclose the source and amount of any cash or property dividend paid from sources other than earned surplus if that is determinable at the time (§510(a)(2)). It is deemed unnecessary to follow the Model Act provisions that permit dividends out of earned surplus only, so long as the shareholder is not misled into believing that a dividend represents a distribution of realized profits when in fact it is something else, e.g., a return of capital.

Earned surplus has been defined in simple terms (§102(a)(6)), and the rules for computing earned surplus (§517) are few, broad and flexible enough to accommodate evolving accounting concepts and practices. For example, provision is made for the maximum rather than the exact amount of earned surplus after mergers or other combinations (§517(a)(1)(B)), for a fresh start upon "quasi reorganization" (§517(a)(4)), and for restoration of earned surplus after resale of treasury shares without the complicated procedure involved in surplus "restrictions" (§§515, 517(a)(5)).

The new statutory machinery for direct disclosure by the corporation to the shareholders concerning dividends and share distributions has been extended to "quasi-reorganizations" as well as to conversion of shares (§519(f)) and to reductions of stated capital involving cancellation of reacquired shares that are restored to unissued status (§515(d)) or revision of the action formerly taken by directors with respect to transfers from surplus to capital and to the allocation of the consideration for shares without par value (§516(c)). The effect of the new

procedure is to eliminate the requirement for the filing of certain "certificates of amendment" which do not really amend any of the information contained in the certificate of incorporation, and which constitute at best partial disclosure to the public at large of incomplete financial information. Some reduction in the burden placed on the secretary of state is expected to result.

ARTICLE 6
(SHAREHOLDERS)

The various provisions relating to Shareholders including their rights and liabilities are covered by Article 6.

The by-laws of a corporation may provide that meetings of shareholders may be held outside the state (§602(a)) without the restrictive limitations of Stk. Corp. L. §45. It is made clear that an annual meeting must be held on a day designated in the by-laws (§602(b)). Notice of a special meeting must state the purpose for which it is called but notice of an annual meeting need not state the purpose unless action proposed to be taken would entitle non-assenting shareholders to demand payment for their shares (§605).

The by-laws or the directors may fix a record date and, if this is not done, the statute fixes the date for determining the shareholders entitled to vote, to dividends, etc. (§604). The statutory quorum of a majority may be fixed at a lesser proportion by the certificate of incorporation or the by-laws or a greater proportion by the certificate of incorporation (§608).

Shares may be issued without voting rights but even the holders of such shares shall be entitled to vote as a class on an amendment which would adversely affect their interests (§613 and §§804 and 903).

A novel provision in §620 permits the certificate of incorporation to control the discretion or powers of the directors, but this is so hedged with restrictions that it has practical application to closely held corporations only. It must have been approved by all shareholders, even those who acquire shares by issue or transfer subsequent to the adoption of such provision and its validity is terminated if shares of the corporation are traded on a national securities exchange. To the extent and so long as such a provision is effective the liability for managerial acts is shifted from the directors to the shareholders.

The Stk. Corp. L. §9 provision that the certificate of incorporation may require a greater quorum or greater proportion of votes than that prescribed by this chapter is continued in §616.

The selection and duties of inspectors of election are detailed in §§610 and 611. The powers of the supreme court respecting elections are expanded.

Section 621 deletes from the voting trust provision of Stk. Corp. L. §50 the right of every other shareholder to transfer his shares to the same trustee and become a party to the agreement. It adds in paragraph (d) a provision new to New York that one or more beneficiaries of the trust, without binding all of them, may extend the trust for an additional period not exceeding ten years.

Existing law with respect to stock option plans is modified. Dissenting shareholders will not have the right to receive payment for their shares in this situation as under present law. Shares optioned to officers, directors or employees under such a plan are not subject to preemptive rights unless expressly so provided in the certificate of incorporation (§622(e)(2)). If it does so provide, then the plan to option the shares without first offering them to shareholders having preemptive rights must be approved by the holders of a majority of the shares entitled to preemptive rights and such approval is binding upon the holders of all shares entitled to such rights (§505(d)).

Section 623 continues the procedure enabling the dissenters to receive payment for shares given by Stk. Corp. L. §21. A shareholder is required to file a notice of objection at or prior to the meeting at which action is proposed to be taken and also, after approval of such action, a notice of election to claim his rights. If agreement as to the value of shares cannot be reached, all dissenters must be joined in one proceeding for appraisal. A shareholder must dissent as to all his shares, and though it is provided that upon filing a notice of election to dissent, he shall cease to have any of the rights of a shareholder except the right to receive payment for his shares and that he may withdraw his election only under certain limited conditions, there is the proviso that the filing of notice of election shall not preclude him from bringing an appropriate suit to obtain relief on the ground that the corporate action is illegal or fraudulent as to him. The corporation continues to have the right to abandon or rescind the proposed action which would give rise to such rights.

Under §624, the shareholder's right of inspection is continued substantially as under present law except that he is given the right to inspect the minutes of shareholders' meetings as well as the list of shareholders. The same right of inspection is given to holders of voting trust certificates. The penalty of \$50 a day to the state and \$50 a day and damages to the one demanding an inspection for denial of an inspection as provided in Stk. Corp. L. §10, was seldom, if ever, enforced and would be of little satisfaction to the shareholder. There has been substituted a remedy by application to the court for an order compelling inspection in a proper case and for such further relief as may seem proper. In lieu of the financial statement to shareholders authorized by Stk. Corp. L. §77, has been substituted the shareholder's right to demand the most recent balance sheet and profit and loss statement.

The corporation's treatment of infant shareholders and bondholders under §625 remains the same as under Gen. Corp. L. §12-a except that "unless the corporation has actual knowledge of infancy is changed to "unless, in the case of shares, the corporation or its transfer agent or, in the case of bonds, the treasurer or paying officer has received written notice that such holder is an infant".

The following provisions as to derivative actions are made by §626: (1) To distinguish a derivative from a direct action, it is stated that the former is brought in the right of a corporation to obtain a judgment in its favor. (2) A clarification of the right of a holder of voting trust certificates or of a beneficial interest in shares, to maintain such an action.

(3) A derivative action may not be discontinued without court approval and a plaintiff must account to the corporation for anything received by him as a result of a judgment or compromise, less his expenses, including attorney's fees.

The provisions of §627 entitle the corporation to require the giving of security for expenses by plaintiffs who do not meet the qualifications as to proportion or value of shares. Expenses include fees of the corporation's attorneys but may include the fees of the attorneys for individual defendants only when the latter are officers or directors and the corporation is obligated to indemnify them under §722.

The most important change in §628 is that the liability of subscribers and shareholders for unpaid balances runs to the corporation, rather than to the creditors, as under Stk. Corp. Law §70, thus enabling the corporation, a receiver or trustee in bankruptcy to collect for the benefit of both creditors and shareholders. The liability is the unpaid balance of the subscription which in no event shall be less than the amount of the consideration for which the share could be issued lawfully. Par value shares may not be issued lawfully for less than par and no shares may be issued lawfully for a consideration that is fraudulently over-valued.

Section 629 retains the provision of Stk. Corp. L. §15 that a shareholder or subscriber may not escape liability by transferring his interest when the corporation is in financial difficulty.

The conflict of policy as to liability of shareholders for unpaid wages, now covered by Stk. Corp. L. §71, has been resolved by a substantial revision which protects the basic needs of the employee. The time limitations on the employee have been liberalized and he is permitted to ascertain the identity of shareholders from the corporate records by a new right of examination granted under section 624(b), but liability is limited to the ten largest shareholders of non-publicly-held corporations.

ARTICLE 7
(DIRECTORS AND OFFICERS)

Many technical changes have been effected by this article in the existing law affecting directors and officers. In addition, a number of changes in substance have been made to accommodate current corporate conditions.

Several changes have been made which, it is expected, will improve the business climate for corporations in this state. Executive committees, for which there is presently no statutory provision, are expressly authorized and vested with broad policy-making and executive powers (§712). The number of directors may be fixed by the by-laws or by the directors under a by-law adopted by the shareholders with a minimum of three (§702). Directors may contract or otherwise deal with their corporations with respect to matters in which they are personally interested. Such contracts and transactions are not automatically void or voidable by reason alone of the director's personal interest therein (§713). Also, an interested director is counted to determine the existence of a quorum for such purpose (§713).

The duty of care required of directors and officers in discharging their duties to the corporation has been adjusted in light of the current needs of the business community. A general rule of good faith based on the standard of ordinarily prudent men under like circumstances, will apply to all situations and allow a more fair evaluation of the equities of the particular case (§717). It is specified, however, that in the discharge of their duties, directors and officers, when acting in good faith, may rely upon financial statements of the corporation prepared by corporate officers or an independent public or certified public accountant.

Directors are authorized to regulate their own compensation for service rendered to the corporation in any capacity (§713), and broad indemnification rights have been given to them and to officers for expenses and, in some cases, the amount expended in defense of civil and criminal actions of every kind, consistently with the protection of the rights of the investing public (§§721-725).

These sections set out an exclusive statutory scheme for indemnification of directors and officers. They do not affect indemnification of corporate personnel other than directors and officers but leave such to contract or the common law of agency. The provisions governing indemnification distinguish between derivative and third party actions, between threatened and pending actions, between expenses, including attorney's fees and the settlement amount, between prepayment and repayment of expenses and between indemnification by voluntary corporate action and that authorized by a court.

The plan permits very broad indemnification, even in criminal actions, but only under conditions which are designed to permit the fixing of responsibility for abuse upon appropriate corporate officers and within limitations based on sound public policy.

The position taken by the Court of Appeals in Schwartz v. General Aniline & Film Corp., 305 N.Y. 395 (1953) that the present indemnification statutes do not authorize reimbursement for expenses in the defense of a criminal prosecution has been altered by express provision (§723).

Directors are authorized to fill vacancies in the board and to fill newly-created directorships resulting from an increase in the membership of the board, even when the by-laws allow them to provide for the increase (§705). The power of the board in the latter case is qualified (§704).

Certain adjustments in existing law have been made with a view to the maximum protection of the rights of the investing public, consistent with the need to encourage business activity in our state. Cumulative voting rights of minority shareholders have been protected against serious impairment through the exercise of the removal power by the majority shareholders (§706). Also, minority shareholders are given the opportunity to petition judicially for the removal of an allegedly derelict director or officer (§§706 and 716). Loans to directors may not be made without disinterested shareholder approval (§714).

The shareholders' right to select the board is protected where increases in the authorized number of directors and the filling of the newly created directorships resulting therefrom stem from action by the directors; in such case, the additional directors cannot be classified until the next annual meeting of shareholders (§704(c)(2)).

A number of adjustments have been made in existing law to meet the special needs of investors in the close corporation. Section 701, which perpetuates for the public issue corporation the principle of board management of the affairs of the corporation, makes possible an invasion of the power of the board in close corporations by provision in the certificate of incorporation, if the holders of all of

the outstanding shares approve. This will allow flexible operation of the close corporation by the owners, with no possible detrimental effect on the principle of board management in the public issue corporation. Also, the super-majority vote and quorum provisions for directors, now found in Stk. Corp. L. §9, are retained (§709). The certificate of incorporation may provide that the officers of the corporation shall be elected by the shareholders, instead of the directors (§715).

This article also eliminates conflicts and inconsistencies in both statutory and case law in some areas. The ambiguity found in present Gen. Corp. L. §§27 and 28 with respect to the vote required for action by the board has been resolved in favor of the provision found in Gen. Corp. L. §27 that action should be by majority of the directors present at a meeting at which a quorum is present (§708).

The question as to whether a judgment creditor of a corporation can recover from a derelict director, for waste, negligence or other violation of his duties, a fund which belongs to the creditor in his individual right, has been resolved by provision that the cause of action belongs to the corporation for the benefit of the creditor to the extent that he has been injured (§719).

Under §720 it is now clear that voting trust certificate holders, and holders of a beneficial interest in the corporate shares, are authorized to institute derivative actions in the right of the corporation.

ARTICLE 8
(AMENDMENTS AND CHANGES)

Article 8 is a simplification of Stk. Corp. L. §§35-38 as to amendments to the certificate of incorporation, §40, restated certificate of incorporation, and a merger of Gen. Corp. L. §9-b and Stk. Corp. L. §26 as to corporations reorganized under an act of Congress.

Unless the certificate of incorporation requires a greater proportion, amendments may be authorized by vote of the holders of a majority, instead of two-thirds, of the shares entitled to vote thereon (§803(a)) and by the holders of a majority of any class of shares that may be adversely affected by an amendment (§804). The right of non-assenting shareholders, adversely affected, to demand payment for their shares is continued (§806(b)(6)).

Routine changes such as of the location of the office of the corporation, the address to which the secretary of state is to mail process against the corporation served upon him or designating, revoking or changing a registered agent or changing the address of such agent, may be authorized by the directors or pursuant to their authority (§803(b)). Certificates effecting such changes are designated certificates of change rather than certificates of amendment (§805(c)). A restated certificate of incorporation, when filed, becomes the certificate of incorporation (§807(e)), rather than presumptive evidence of incorporation as under Stk. Corp. L. §40(a).

Class voting on amendment is provided by statute under certain circumstances (§804).

ARTICLE 9

(MERGER OR CONSOLIDATION; GUARANTEE; DISPOSITION OF ASSETS)

Article 9 clearly distinguishes the merger procedure from consolidation. Stk. Corp. L. §§86 and 91 have been a source of confusion because they join both merger and consolidation procedures under the "consolidation" title.

Mergers of two types are authorized under this article, i.e. a non-parent-subsidary merger by the same procedure provided for consolidation (§§902-904); and, as under existing law, a parent-subsidary merger where the parent owns at least 95% of the shares of each class of the subsidiary (§905). In neither type of merger is there a requirement, now found in Stk. Corp. L. §85, that both constituent corporations must have been authorized to engage in a similar or incidental business.

The procedure for effecting either a merger or consolidation is clarified by drawing a distinction between the "plan" of merger or consolidation, (which requires the same two-thirds consent of all outstanding shares entitled to vote, as under existing law), and the "certificate" of merger or consolidation which is ultimately filed containing the plan of merger or consolidation along with other essential information.

Changes have been made by provisions which authorize the abandonment of the plan of merger or consolidation at any time prior to the filing of the certificate (§903(b)), and which make possible fixing the effective date of the merger or consolidation on a date specified in the certificate subsequent to, but not later than 30

days after, the date of filing of the certificate by the department of state (§§906(a); 907(f)). This latter provision allows a proper synchronization of the details of the merger or consolidation, particularly where a foreign corporation is involved.

Existing law relating to the sale or other disposition of assets not in the usual or regular course of business has been retained with the significant modification that the minority viewpoint in Eisen v. Post, 3 N.Y. 2d 518 (1957) is adopted by incorporating the clause "business actually conducted by the corporation" instead of relating the sale to the course of business as defined by the certificate of incorporation. Further clarification is achieved by the provision that shares of a domestic or foreign corporation are properly receivable by a corporation as consideration in exchange for a sale or other disposition of its assets, and by authorization for the abandonment of a proposed sale or other disposition, notwithstanding shareholder approval, in the discretion of the directors without further action by the shareholders (§909).

The right of a dissenting shareholder to receive payment for his shares presently available in mergers, consolidations and sales of essential properties, has been retained in its present form and substance, with an exception in the case of a sale or other disposition wholly for cash where the shareholders' authorization thereof is conditioned upon dissolution and distribution of the cash, in which case there is no right to receive payment for shares (§910(a)(2)). This latter provision is consistent with the absence of such rights, generally, for dissenting shareholders in a dissolution.

The existing requirement for shareholder approval of a mortgage of corporate assets (Stk. Corp. L. §16) has not been carried over to the chapter. To highlight this change and to avoid confusion with existing case law, section 911 expressly states that the directors may authorize any mortgage or pledge of all or any part of the assets of the corporation without shareholder authorization unless otherwise provided by the certificate of incorporation.

ARTICLE 10
(NON-JUDICIAL DISSOLUTION)

The two involved sections on Non-Judicial Dissolution in the Stk. Corp. L. §§105 and 106, have been broken down into eight short sections. The changes made in Article 10 are not radical.

When, after incorporation and before there were shareholders of record, it was decided to dissolve, Stk. Corp. L. §105 required the consent of all incorporators and all subscribers for shares. To make dissolution easier under such circumstances, §1001 of the chapter requires the consent of a majority in interest of the subscribers for shares or, if no subscriptions have been accepted, the consent of a majority of the incorporators. When there are shareholders of record, the required two-thirds vote has been continued.

Dissolution becomes effective when the certificate of dissolution is filed in the office of the department of state and thereafter the corporation can carry on no business except for the purpose of winding up. The provision in Stk. Corp. L. §105(11) for an additional certificate of termination of corporate existence has been eliminated.

It is made clear in §1005 that the directors of a dissolved corporation are not trustees of its assets and that title to the assets remains in the corporation and may be transferred in its name. If a sale of assets is to be made to another corporation for its securities or partly for cash and partly for its securities with distributions of these to the shareholders, such a transaction must be authorized by a vote of the holders of a majority of the shares and dissenters are given the right to elect to receive payment for their shares.

The provisions in Stk. Corp. L. §§105(10) and 106(9) for notice to creditors and filing and barring of claims are continued in the new §1006. Creditors must be allowed not less than 180 days, rather than not less than 40 days, in which to file claims. The provision of Stk. Corp. L. §106 as to the jurisdiction of the supreme court to supervise liquidation is continued in §1007. Funds distributable to creditors or shareholders who cannot be found are to be paid to the state comptroller as abandoned property.

ARTICLE 11 (JUDICIAL DISSOLUTION)

Some of the causes for dissolution at the suit of the

attorney-general specified in the General Corporation Law have, after careful consideration, been omitted from Article 11. For example, the attorney-general could bring an action when the corporation had not organized and commenced business within two years after incorporation (Gen. Corp. L. §91). Substantially equivalent remedies exist under the Tax Law §203, 203-a and 216, under which, at the instance of the tax commission, the attorney-general may bring an action to collect taxes due or to dissolve a corporation for intentional default in filing reports or paying taxes, and the secretary of state may proclaim dissolved a corporation that has not filed reports or paid taxes for three consecutive years. The provision in Gen. Corp. L. §71 that the attorney-general might bring action for the dissolution of a corporation that had been insolvent for at least a year, has been omitted because there is no public interest in an insolvent private business corporation subject to this chapter as distinguished from an insurance, banking or public service corporation.

Section 403 of the new chapter authorizes the attorney-general to attack a *de facto* corporation and, under §1101, he can sue for the dissolution of a corporation that "has exceeded or abused the authority conferred upon it by law", violated any provision of law whereby it has forfeited its charter or has conducted its business in a persistently fraudulent or illegal manner. Section 1101 also preserves all provisions for dissolution by the attorney-general which exist under other statutes.

Section 109(d) continues the general authority which he has under Gen. Corp. L. §92-2, in connection with any proposed action against a corporation, to take proof and make a determination of the relevant facts in the manner provided in §406 of the C.P.A.

In addition to the right of directors or of the shareholders, by a majority vote, to petition for dissolution when liabilities exceed assets or when dissolution would be beneficial to the shareholders (§§1102 and 1103), it is emphasized in §§1104 and 1112 that dissension between factions of shareholders, particularly in small corporations, which makes continued association unworkable, is a ground for dissolution even though the business can be conducted at a profit. It is also provided in §1104 that any shareholder may petition for dissolution if a deadlock has resulted in an inability to elect directors for a period which includes two consecutive annual meeting dates. As an additional remedy for situations that may arise in closely held corporations, there is statutory recognition of the validity of an agreement that any shareholder, or the holders of any specified proportion of shares, may enforce dissolution at will or upon the occurrence of any specified event. Such a provision must have unanimous shareholder approval (§1105) and must be contained in the certificate of incorporation. The right to enforce dissolution of a closely held corporation is thus similar to the right of a partner to enforce dissolution of a partnership.

Another new provision authorizes the discontinuance of any action or special proceeding for dissolution if it is established that the ground for dissolution did not exist or no longer exists (§1117). This could be useful under a variety of circumstances,

e.g., where a deadlock has been broken or a dissolution has terminated in a reorganization.

By cross reference, the provisions of §§1004 (Procedure after dissolution), 1005 (Corporate action and survival of remedies after dissolution), 1006 (Notice to creditors; filing or barring of claims) and 1007 (Jurisdiction of supreme court to supervise liquidation) are made applicable to a corporation dissolved under Article 11.

ARTICLE 12 (RECEIVERSHIP)

The specific statutory treatment of receivers presently found in the General Corporation Law has been continued in Article 12 of the chapter. Most of the material contained in over forty sections in the General Corporation Law has been carried over into Article 12 and there combined with a number of relevant sections from the Stock Corporation Law. This was done through considerable rearrangement and reduction of excess verbiage wherever possible.

The equitable remedy of sequestration, now Gen. Corp. L. §70, which necessarily involves the appointment of a receiver, has been preserved in §1201 as a valuable aid to the creditor of a corporation. §1202 sets forth the other instances in which a receiver may be appointed including non-judicial and judicial dissolutions. When it becomes necessary in one of these instances to appoint a temporary receiver before a final judgment or final order

is secured, his powers and duties may be limited or expanded up to those which may be given a permanent receiver (§1206) according to the Court's discretion. The right to appeal from the court's determination of the necessity or advisability of appointing a receiver or attorney for a receiver is added to §1203.

Section 1207 outlines the course of action a receiver must pursue when he is appointed, including the marshalling of assets, notice to creditors and claimants and keeping accurate records. If a receiver is appointed in dissolution proceedings under Article 10 or 11, §1006 applies and controls the giving of notice and the filing and barring of claims. Forfeiture of double the value of any property concealed from the receiver is provided (§1208). The receiver may further implement his powers under these sections by applying to the court for the considerable discovery and injunctive relief afforded by §1209.

The court which appoints the receiver and controls his activities is the Supreme Court in the judicial district where the office of the corporation in receivership is located, although this requirement is now left to the Rules of Civil Practice (Rule 178), which parallels the omitted Gen. Corp. L. §138.

After the receiver has proceeded to the point where debts and claims may be paid, §1210 dictates the order of payment with wages of unpaid corporate employees preferred first as in the present law. Distributions to creditors or claimants are referred to as distributions rather than dividends. After the "final distribution" under §1211 and deduction of the receiver's charges and expenses the shareholders become entitled to participate in any surplus under §1212.

201
201

Intertwined throughout Article 12 are provisions for notice by publication to those interested in the receivership. The length of the publication has been reduced for notice of the appointment of a receiver (§1207), payment of the final distribution (§1211) and final account (§1216) from the three weeks in the present law to two weeks. Six weeks is retained, however, as the period for publication of a notice that the receiver seeks to resign.

The attorney-general may move under §1214 for an order removing a receiver or closing the receivership on behalf of the shareholders, creditors or any other persons interested in the assets of the corporation, as presently provided, except he will no longer be limited to receiverships of insolvent corporations. The attorney-general must be notified under §1213 when a receiver seeks to be relieved of an omission or default and he must receive a statement of assets provided in §1207. Under §1216 the attorney-general must also be notified of the receiver's application for approval of his final account.

Finally, in the matter of commissions, a simple formula based upon the amounts permitted where the receiver acted in a voluntary dissolution under the present law has been applied to all types of receiverships. The limitation of no more than twelve thousand dollars in one year nor proportionately more for any period less than one year has therefore been eliminated. When more than one receiver is appointed the prescribed commission is to be divided between them as the court directs. The matter of necessary expenses, principally attorneys' fees, is left to the court's discretion. The question of whether it is necessary to employ counsel is left to Rule 180, Rules of Civil Practice.

ARTICLE 13
(FOREIGN CORPORATIONS)

Article 13 is entitled "Foreign Corporations". It assembles into one article, either in full or by express cross reference, all of the provisions of the Business Corporation Law which relate to business corporations incorporated outside this state.

Section 1301 is new, setting forth activities which are not "doing business" in the state for the purposes of this chapter, but there is the express qualification that this specification does not establish a standard for those activities which may subject a foreign corporation to service of process in this state. (See, e.g. CPA §1217(a)).

The requirements for securing authorization to do business in this state, set forth in §1304-1306, are substantially the same as the present law, but the procedure has been modified by eliminating the requirement for issuing a "certificate of authority", thus simplifying and reducing the administrative burden of both the foreign corporation and the department of state. Provisions have been inserted as to the effect of filing such application and the powers thereby conferred upon the foreign corporation.

The new statute is made applicable to foreign corporations now authorized to do business in this state without further action by the corporation.

Provisions relating to amendments and changes, which are in several sections of the present law, are consolidated and simplified. A single form is provided for all amendments and changes.

In particular, the burden upon a foreign corporation changing its name is greatly reduced by the simplified procedure. The procedural requirements for surrender of authority have also been simplified.

A new provision (§1311) permits the filing of a certificate or certified copy of a decree or order as to the termination of the existence of a foreign corporation in its home jurisdiction. This provision will permit the department of state to clear its index of the names of moribund foreign corporations.

The present rule, that a foreign corporation cannot enforce a contract made in this state unless it was, at the time of making the contract, authorized to transact business here, has been changed to permit it to sue after it has been authorized to do business and has paid all taxes and penalties^(§1312). A new paragraph codifies decisional law by expressly permitting other parties to such a contract to enforce it against the foreign corporation.

The role of the attorney-general in protecting the citizens of this state against unauthorized acts of foreign corporations has been clarified in §1303. He is given discretion to prosecute material violations and additional power to move to annul a foreign corporation's authority if it was procured by material misrepresentation or to enjoin or annul the authority of a foreign corporation which has committed a violation of law that, if committed by a domestic corporation, would be a ground for dissolution.

Sections 1313 and 1314 relating to actions by and against foreign corporations continue the present law without substantial change.

The present requirement that foreign corporations maintain in this state records of their shareholders has been discontinued, but a qualified resident shareholder or voting trust certificate holder may require such records to be produced in this state.

A new distinction has been drawn between "domiciled foreign corporations" and other foreign corporations (§1317). The former, at least two-thirds of whose outstanding shares, or voting shares, are owned by residents of this state or two-thirds of whose business or investment income is allocable to this state, are subjected to the same provisions as domestic corporations in regard to disclosure of financial information and liability and indemnification of officers and directors.

The final section enumerates the sections of the other provisions of this chapter which apply to foreign corporations generally and to domiciled foreign corporations.

ARTICLE 14 (EFFECTIVE DATE)

Although this chapter may be enacted by the New York State Legislature during the 1961 legislative session, the effective date of this chapter will be, as provided in Article 14 thereof, April 1, 1963.

The effective date has been, in effect, delayed two years. This delay is provided in order to permit most corporations

to have at least two annual meetings of shareholders between the passage and the effective date.

Such delay will allow time for any alterations in the certificates or by-laws of existing corporations which may be necessary to conform to the provisions of this chapter. The transition will therefore be of an evolutionary nature rather than a revolutionary change, as would be the case if no delay in effective date were provided.

The delayed effective date will make possible by action during the 1962 and 1963 legislative sessions any amendments shown to be necessary as the result of continued study.



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THE JUDICIAL CONFERENCE
OF THE
STATE OF NEW YORK
270 BROADWAY
NEW YORK 7, N. Y.
BARCLAY 7-1616

S-522

THOMAS F. MCCOY
STATE ADMINISTRATOR

April 3, 1961

Hon. Robert MacCrate
Counsel to the Governor
The State Capitol
Albany, New York

Re: Senate Int. 522, Print 4061
(by Mr. Anderson)

Dear Mr. MacCrate:

We have your request for comment and recommendation concerning the above captioned legislation, in relation to business corporations, constituting chapter four of the Consolidated Laws.

This bill constitutes a complete revision of the Business Corporation Law. It is recommended by the Joint Legislative Committee to study Revision of the Corporation Laws.

This bill consists of fourteen articles and over 1000 sections dealing with every phase of corporate law. It is of course impossible for me to pass judgment upon this proposal in a section-by-section way. Indeed, the effective date of the act is April 1, 1963. This should afford ample opportunity for a closer scrutiny of the new provisions. A perusal through the 191 pages of this act does not disclose to me anything objectionable.

This bill has not been considered by the Judicial Conference. I would personally recommend that it be approved.

Sincerely yours,

Thomas F. McCoy

State Administrator

TFM:ah



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RICHARD C. LOUNSBERRY

STATE OF NEW YORK
JOINT LEGISLATIVE COMMITTEE
TO

WALTER J. MAHONEY
JOSEPH F. CARLINO
JOSEPH ZARETZKI
CHARLES A. SCHOENECK, JR.
ANTHONY J. TRAVIA
AUSTIN W. ERWIN
WILLIAM H. MACKENZIE

STUDY REVISION OF CORPORATION LAWS

SENATE CHAMBER
THE CAPITOL
ALBANY, N. Y.

REPLY TO:
ROOM 1708
RAND BUILDING
BUFFALO, N. Y.

ROBERT S. LESHER
COUNSEL

March 29, 1961

Hon. Robert MacCrate
Counsel to the Governor
Executive Chamber
State Capitol
Albany 1, New York

Dear Bob:

Re: Business Corporation Law, Senate Int. #522,
Pr. #4061; Assembly Int. #885, Pr. #5310

Anticipating that he would receive a request from your office during the next two weeks while he is away, Senator Anderson has instructed me to send to you the enclosed copy of our Explanatory Memorandum of March 13, 1961 covering the new Business Corporation Law, Senate Int. #522, Pr. #4061; Assembly Int. #885, Pr. #5310.

As I mentioned to Frank Wille, Senator Anderson and Assemblyman Brook would appreciate being given the opportunity to be present if and when the Governor signs the bill.

If we can be of any further assistance, kindly advise.

Sincerely yours,

Robert S. Lesh
ROBERT S. LESHER
Counsel

ba
Enclosure



PETER WARD
DEPUTY SUPERINTENDENT
AND GENERAL COUNSEL

STATE OF NEW YORK
INSURANCE DEPARTMENT
123 WILLIAM ST.
NEW YORK 38

5-522

MEMORANDUM TO THE GOVERNOR

RE

AN ACT IN RELATION TO BUSINESS CORPORATIONS, CONSTITUTING
CHAPTER FOUR OF THE CONSOLIDATED LAWS.

INSURANCE DEPARTMENT

Senate
Print 4061
Int. 522

INTRODUCED BY:
Mr. Anderson

RECOMMENDATION: No objection.

STATUTES INVOLVED: Business Corporation Law.

EFFECTIVE DATE: April 1, 1963

DISCUSSION:

This is not a Department proposal. The bill proposes a new Business Corporation Law to go into effect April 1, 1963. Numerous changes have been made in the bill as finally enacted, in comparison with the original submission. This bill has no application to insurance corporations and, therefore, this Department sees no objection to favorable action on the measure.

Respectfully submitted,

THOMAS THACHER
Superintendent of Insurance

By

Peter Ward
Deputy Superintendent and General Counsel.

April 17, 1961



FOUNDED IN 1914

Associated Industries of New York State, Inc.

April 12, 1961

5522

Honorable Robert MacCrate
Counsel to the Governor
Executive Chamber
The Capitol
Albany 1, New York

Dear Mr. MacCrate:

Re Senate Int. 522, Pr. 4061

This bill incorporates recommendations of the Joint Legislative Committee to Study Revision of Corporation Laws and in this amended version represents a considerable improvement over the bill initially filed. However, public hearings on this measure brought out a number of defects, and the understanding is that further corrective measures will be worked out during the period between now and the convening of the next Legislature. The fact that this bill has an effective date of April 1, 1963 makes this procedure possible and practical.

Sincerely,


Joseph R. Shaw
President

JRS/jss

MEMORANDUM

New York State Department of Commerce

April 6, 1961

5522

SENATE:

Int. 522

Pr. 522, 4061

Introduced by
Mr. Anderson

RECOMMENDATION: The Department of Commerce has no objection to this bill.

STATUTES INVOLVED: Amends Consolidated Laws.

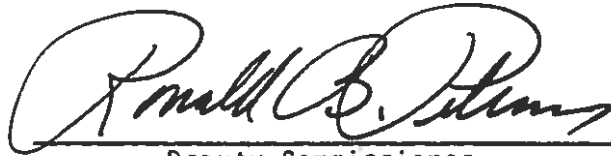
EFFECTIVE DATE: This act shall take effect April 1, 1963.

DISCUSSION:

1. Purpose of bill: The purpose of this bill is to revise the laws relating to business corporations in New York State.
2. Summary of provisions of bill: The business corporation law when approved will constitute a single unified law governing business corporations. This will make the existing general corporation law and the stock corporation law inapplicable to business corporations.
3. Prior legislative history of bill: The subject bill represents a revision of the original pre-filed bill which was introduced for study purposes during the 1960 session.
4. Known position of others respecting bill: It is our understanding that the New York State Bar Association, the Bar Association of the City of New York, Commerce and Industry and Associated Industries have no objection to this bill, although at least one employer organization will have amendments to suggest at the next session of the Legislature.
5. Budget implications: Unknown.
8. Reasons for recommendation: This bill simplifies the present law relating to stock corporations by eliminating many of the archaic requirements and recognizing the realities of modern corporate practices. It simplifies incorporation and organization procedures; expands the powers of directors and makes changes which it is expected will improve the business climate for corporations in this State. (Formation of executive committees, fixing the number of directors by by-laws, permitting directors to contract or otherwise deal with corporations with respect to matters which they are personally interested in, permitting directors to rely upon financial statements under certain circumstances, regulating their own compensation and to be indemnified for the expense of defending not only civil but criminal actions in certain circumstances.)

It liberalizes the present provisions of the stock corporation and the general corporation law relating to foreign corporations. For example, certain activities of foreign corporations are not considered doing business in this State; foreign corporations are permitted to enforce contracts made when they are not authorized to do business here.

A new distinction has been drawn between "domiciled foreign corporations" and other foreign corporations. The former, at least two-thirds of whose outstanding shares, of voting shares, are owned by residents of this state or two-thirds of whose business or investment income is allocable to this state, are subjected to the same provisions as domestic corporations in regard to disclosure of financial information and liability and indemnification of officers and directors.

A handwritten signature in cursive script, reading "Arnold B. Pittman". The signature is written in dark ink and is positioned above a horizontal line.

Deputy Commissioner

PATRICK H. HODGSON
HUGH MCM. RUSS
RALPH M. ANDREWS
HOMER H. WOODS
LAURENCE R. GOODYEAR
ROBERT R. BARRETT
JOHN E. DICKINSON
EDWIN O. DITON
ARNOLD T. OLENA
RAYMOND W. CONKLIN
GROVER R. JAMES, JR.
DONALD C. LUDICK
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THORNTON G. EDWARDS
VICTOR T. FUZAK
GORDON A. MACLEOD
DOUGLAS W. KUHN
RALPH W. LARSON

HODGSON, RUSS, ANDREWS, WOODS & GOODYEAR
ATTORNEYS AT LAW
800 M & T BUILDING
BUFFALO 2, N. Y.

AIR MAIL

TELEPHONE
716 TL 6-4000

April 11, 1961

Honorable Robert MacCrate
Counsel to the Governor
Executive Chamber
Albany, New York

Dear Bob;

Re: Senate Print 522, 4061, Intro. 522
(The Business Corporation Law)

It is my understanding that the above bill was passed by the Legislature on the basis that prior to its effective date, April 1, 1963, appropriate amendments will be made. Personally, I do not believe the necessary amendments will be adopted and we will then have another statute which will discourage business coming into this state.

I am sorry that absence from the city has prevented my writing you earlier on this point.

As you know, I have done a great deal of work with the Corporation Law Committee on the proposed Business Corporation Law. I attended the recent meeting of the State and City Bars at which it was decided to withdraw opposition to the passage of the bill at this time on the grounds that appropriate amendments could and would be made prior to the effective date. This action was taken as a gesture of good will toward the members of the Legislature, but the consensus of the meeting was very clearly one of dissatisfaction with the Act as drafted.

In the drafting of this bill, no consideration whatsoever was given to the interstate competition for business. No consideration whatsoever was given to the fact that states like Delaware and the many states which have adopted the Model Act are offering to businessmen the opportunity of incorporating companies under a statute much more adaptable to the needs of business. I have no hesitation in saying that the initial drafts of this Act, in my opinion, were the most anti-business laws ever drafted. Substantial changes have been made in the earlier drafts, but let's not put this bill into effect on any assumption that it will be amended prior to

Honorable Robert MacCrate

- 2 -

April 11, 1961

its effective date, and that in its present form it will not discourage corporations from doing business in this state.

The proposed Act is clearly disadvantageous to small corporations. It is my recollection that small corporations provide the largest number of jobs in this state. Large corporations could probably get along by using the New York statute only for business in this state. But we want head offices in this state and not just a branch operation. Our great development in New York City is based almost entirely on bringing the head office of corporations to this state. The Act will certainly not encourage continuation of this trend.

I see nothing to be gained by putting this bill into effect at this time. Let us work it over again this year. If we cannot agree upon major points, I would suggest that the items in dispute be resolved by leaving the present law in effect. I will not go into details at this time, but on the major items of differences, I would prefer the present law to the one proposed.

Sincerely,



Homer H. Woods.

HHW:etr

Bill Jacket
S. 522

International Business Machines Corporation

Ch. 855

590 Madison Avenue, New York 22.

Office of the Secretary

April 13, 1961

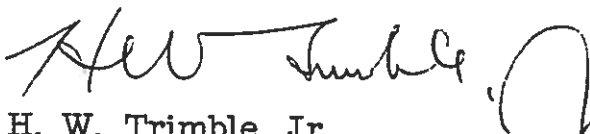
Honorable Robert MacCrate
Counsel to the Governor
State of New York
Executive Chamber
Albany, New York

Dear Mr. MacCrate:

Mr. Frank Willie has forwarded to me a copy of the proposed New York Business Corporation Law. I have reviewed this bill for the American Society of Corporate Secretaries, and recommend that it be signed by the Governor.

Senator Anderson and others on the Joint Study Committee, as well as Robert S. Leshner, Counsel to the Committee, should be congratulated on the fine job they accomplished in drafting this new law.

Sincerely,



H. W. Trimble, Jr.
Secretary

HWT, Jr/dl



STATE OF NEW YORK
DEPARTMENT OF AUDIT AND CONTROL
ALBANY

ARTHUR LEVITT
STATE COMPTROLLER

March 28, 1961

IN REPLYING REFER TO

REPORT TO THE GOVERNOR ON LEGISLATION

To: Hon. Robert MacCrate, Counsel to the Governor

The following bills are of no concern to this Department:

| SENATE INTRO. | | PRINT | |
|---------------|-------|-------|------|
| | 522 ✓ | | 4061 |
| | 675 | | 4163 |
| | 766 | | 4294 |
| | 868 | | 4499 |
| | 877 | | 3673 |
| | 1298 | | 4025 |
| | 1331 | | 3442 |
| | 2208 | | 2311 |
| | 2469 | | 4077 |
| | 2598 | | 2740 |
| | 2955 | | 3158 |
| | 3177 | | 4538 |
| | 3325 | | 3609 |
| | 3343 | | 3627 |
| | 3386 | | 4414 |
| | 3401 | | 3691 |
| | 3509 | | 3860 |
| | 3513 | | 4403 |
| | 3558 | | 3910 |
| | 3640 | | 4512 |
| | 3670 | | 4049 |
| | 3781 | | 4430 |
| | 3818 | | 4482 |
| | 3590 | | 4330 |
| | 3571 | | 3923 |
| | 3532 | | 3884 |
| | 3526 | | 3878 |
| | 3438 | | 3768 |
| | 3429 | | 3759 |
| | 3264 | | 5362 |
| | 3195 | | 3478 |
| | 3047 | | 3290 |
| | 2967 | | 3170 |
| | 2953 | | 3156 |

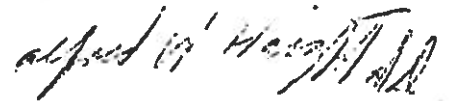
| | | | |
|-----------------|------|-------|--------|
| SENATE INTRO. | 228 | PRINT | 228 |
| | 666 | | 4162 |
| | 1045 | | 1046 |
| | 1349 | | 2588 |
| | 1513 | | 1554 |
| | 2031 | | 2127 |
| | 2208 | | 2311 |
| | 2709 | | 2887 |
| | 2862 | | 3063 |
| | 2951 | | 4048 |
| ASSEMBLY INTRO. | 256 | PRINT | 256 |
| | 257 | | 257 |
| | 494 | | 494 |
| | 570 | | 570 |
| | 950 | | 5351 |
| | 1253 | | 1253 |
| | 1699 | | 5534 |
| | 2232 | | S-4370 |
| | 2682 | | 2744 |
| | 2813 | | 2900 |
| | 2904 | | 5528 |
| | 3019 | | 5345 |
| | 3042 | | 3151 |
| | 3152 | | 5107 |
| | 3380 | | 3510 |
| | 3399 | | 5040 |
| | 3462 | | 3592 |
| | 3712 | | 3867 |
| | 3713 | | 3868 |
| | 3731 | | 3886 |
| | 3812 | | 3972 |
| | 3819 | | 3979 |
| | 3842 | | 5423 |
| | 4054 | | 5214 |
| | 4207 | | 5265 |
| | 4254 | | 5235 |
| | 4361 | | 5346 |
| | 4365 | | 5439 |
| | 4374 | | 4639 |
| | 4421 | | 4686 |
| | 4431 | | 4696 |
| | 4456 | | 4721 |
| | 4463 | | 4750 |
| | 4518 | | 4805 |

ASSEMBLY INTRO. 4642
4687
4696
4723
4752
4754

PRINT 4929
5349
5027
5524
5165
5167

ARTHUR LEVITT
State Comptroller

By



Alfred W. Haight
First Deputy Comptroller

DD:ac

CAROLINE K. SIMON
SECRETARY OF STATE

ABRAHAM N. DAVIS
EXECUTIVE DEPUTY SECRETARY



STATE OF NEW YORK
DEPARTMENT OF STATE
164 STATE STREET
ALBANY 1

5-3-61

April 4, 1961

MEMORANDUM to HON. ROBERT MacGRATE
COUNSEL TO THE GOVERNOR

Re: Senate Int. 522, Pr. 522, 4061

Enclosed herewith, is memorandum, in respect
to the above-entitled bill.

CAROLINE K. SIMON
Secretary of State
By

Caroline K. Simon

Abraham N. Davis
Executive Deputy
Secretary of State

d;no
encl.

----- April 4, 1961
(date)SENATE - Introduced by:
Mr. AndersonInt. 522
Pr. 522, 4061ASSEMBLY - Introduced by:Int.
Pr.

RECOMMENDATION: (check one) approved ☒ No objection ☐
Disapproved ☐ No recommendation ☐

STATUTES INVOLVED:

General Corporation Law; Stock Corporation Law

EFFECTIVE DATE: April 1, 1963DISCUSSION:

1. Purpose of bill: To create a new business corporations law which will replace the stock corporation law and the general corporation law for the organization and control of business corporations organized for profit.

2. Summary of provisions of bill:

1 Enacts a complete regulatory law

3. Prior legislative history of bill and similar proposals:

This is the first complete revision of the stock corporation law since 1923, which included therein most of the Business Corporation Law then in force.

4. Known position of others respecting bill:

Association of the Bar of the City of New York, State Bar Association and others support the bill.

5. Budget implications: There will be serious budget implications for the Department of State. The amount thereof has not yet been determined. It is expected that an estimate thereof will be available for consideration by Budget and the Legislature in 1962.

6. Arguments in support of bill: The bill is the result of an intensive study by the Joint Legislative Committee to Study Revision of Corporation Laws. The Department of State cooperated with the Legislative Committee in the study and drafting of the bill. It is intended to add provisions for fees, omitted from the bill, and to make any changes prior to its effective date.

7. Arguments in opposition to bill:

8. Reasons for recommendation: The law with respect to Business Corporations will be contained in one chapter, thereby eliminating the necessity for reference to the General and Stock Corporation Laws. Many of the substantive and administrative provisions are advances over existing law.

(If additional space is needed for answering any question, attach original sheets of plain paper.)

New York State LEGISLATIVE ANNUAL

THIS EXTRA MATERIAL ADDED BY
NEW YORK LEGISLATIVE SERVICE, INC.
It is not part of the original
Governor's Bill Jacket

1961

CORPORATIONS AND BANKING

Business Corporation Law, new

S. I. 522, Pr. 4061, Anderson Ch. 855

[Editor's note: For the most complete and authoritative source memorandum on this important new statute, see the "Revised Supplement to Fifth Interim Report to 1961 Session of New York State Legislature", issued by the drafters of the new statute—the Joint Legislative Committee to Study Revision of Corporation Laws—and printed as part of Legislative Document No. 12 (1961). Such Revised Supplement sets forth the official Revisers' Notes, and Comment, on each section of the new statute.

For comments on the text of the statute, in the form in which it was first submitted to the 1961 Legislature, and prior to substantial amendments which were made when the statute was adopted in its final form, see (1) the Joint Legislative Committee's "Supplement to Fifth Interim Report" (as distinguished from the Revised Supplement mentioned first above), issued in December, 1960 and printed as part of Legislative Document No. 12 (1961), and (2) the Joint Report issued by the Committee on Corporation Law of the New York State Bar Association and by the Committee on Corporate Law of The Association of the Bar of the City of New York, dated January 25, 1961. These two reports, particularly the criticisms and suggestions set forth in the two Bar Associations' Joint Report, are very helpful in understanding the reasons for and the intent underlying some of the last-minute amendments made in the text of the proposed statute just before it was enacted by the 1961 Legislature.

See also the Joint Legislative Committee's First Interim Report, Second Interim Report, Third Interim Report, and Fourth Interim Report, printed, respectively, in Legislative Document No. 17 (1957), Legislative Document No. 23 (1958), Legislative Document No. 39 (1959), and Legislative Document No. 15 (1960).]
