To Be Argued by:
Albert Y. Chang
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New York Supreme Court

APPELLATE DIVISION — FIRST DEPARTMENT

Case No. 2022-04657

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

Plaintiff-Appellant,

against

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

(Caption Continued on the Reverse)

REPLY BRIEF FOR PLAINTIFF-APPELLANT

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Defendants-Respondents,

and

BARCLAYS PLC,

Nominal Defendant-Respondent.

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PRELIMINARY STATEMENT

BCL §626's gatekeeping rules governing shareholder derivative actions in New York apply here because the text of §1319 so requires.[1] Legislative history reflects the New York Legislature's intent, in enacting Article 13, to regulate certain discreet aspects of the "internal affairs" of foreign corporations doing business in New York. The common-law internal-affairs doctrine must give way to this statutory command. This is the holding in *Culligan Soft Water Co. v. Clayton Dubilier & Rice LLC*: "the issue of plaintiffs' standing to bring a shareholder derivative action is governed by New York law"—not by the law of the place of incorporation. 118 A.D.3d 422, 423 (1st Dep't 2014). In invoking the internal-affairs doctrine and applying English law, however, the lower court failed to follow *Culligan* and disregarded §1319. By dismissing this action brought by a New York resident shareholder, the lower court effectively abdicated its jurisdiction over shareholder derivative actions conferred by §626. This is error and must be reversed.

Defendants propose three alternative grounds for affirmance, all of which call for fact-intensive inquiries and are subject to an abuse-of-discretion review. The Court should decline to reach these issues. But even if these proposed grounds can be properly reviewed, they are meritless. This Court should reverse and remand.

[1] This reply brief adopts all defined terms in the January 3, 2023 Brief for Plaintiff-Appellant (the "Opening Brief"). All emphases in quoted texts are added.

ARGUMENT

I. The Lower Court Erred by Misconstruing BCL §1319 and by Failing to Follow Precedents, in Applying English Law—Rather Than New York Law—on the Issue of a Shareholder's Standing to Bring a Derivative Action in a New York Court

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

A. The Lower Court Disregarded BCL §1319's Mandate and *Culligan*'s Holding to Apply §626 to Shareholder Derivative Actions Brought on Behalf of Foreign Corporations Doing Business in New York

For nearly two centuries, New York courts have exercised jurisdiction over shareholder derivative actions. *See Robinson v. Smith*, 3 Paige Ch. 222, 231–32 (N.Y. Ch. 1832). The Legislature enacted BCL §626, conferring jurisdiction to New York courts over actions brought on behalf of "domestic *or foreign* corporation[s]" and, to protect shareholder rights,[2] granting standing to sue to all "holder[s] of shares … of the corporation or of a beneficial interest in such shares." N.Y. BUS. CORP. LAW §626(a). The Legislature also enacted §1319, as part of the scheme to regulate certain aspects of the "internal affairs" of foreign corporations doing business in

[2] Robert A. Kessler, *The New York Business Corporation Law*, ST. JOHN'S L. REV., Vol. 36, No. 1, Art. 1, at 107–08 & n.418 (Dec. 1961) (balancing "protection to the shareholders" against "avoid[ing] discouraging foreign corporations from doing business in New York").

New York. *See* Bill Jacket, L 1961, ch. 855, *Joint Report of Committees on Corporate Law of the New York State and New York City Bar Association*, at 32–35 (Jan. 25, 1961). Specific and unambiguous, §1319's text mandates that §626 "*shall* apply to a foreign corporation doing business in this state, its directors, officers and shareholders." N.Y. BUS. CORP. LAW §1319(a)(2).

The Court of Appeals has long implemented the Legislature's scheme to regulate foreign corporations, reasoning that, by choosing to do business in New York, they have consented to the application of New York's laws. *German-American Coffee Co. v. Diehl*, 216 N.Y. 57, 64 (1915). Following *German-American Coffee* and §1319, this Court in *Culligan* held that "*the issue of plaintiffs' standing to bring a shareholder derivative action is governed by New York law*"—not by the law of the place of incorporation. *See* 118 A.D.3d at 423. In so holding, this Court reasoned that §1319 displaced the internal-affairs doctrine, which would otherwise make applicable the law of the corporation's place of incorporation. *Id*.

In contravention of *Culligan*'s holding and §1319's text, however, the lower court invoked the internal-affairs doctrine and applied English law on the issue of Plaintiff's standing to bring derivative claims. This is error and must be reversed.

1. Consistent with BCL §1319's Text and Legislative History, §626 "Shall Apply" to All Shareholder Derivative Actions Brought in New York Courts

Courts are duty-bound "to effectuate the intent of the Legislature," and "the clearest indicator of legislative intent is the statutory text." *Majewski v. Broadalbin-Perth Cent. Sch. Dist.*, 91 N.Y.2d 577, 583 (1998). Here, §1319's text leaves no room for debate: §626—New York's gatekeeping rules governing shareholder derivative actions—"*shall apply to a foreign corporation* doing business in this state, its directors, officers and shareholders." N.Y. BUS. CORP. LAW §1319(a)(2). Where, as here, legislative intent is clear from statutory text, courts need not resort to legislative history and must apply the statute according to its plain text. *Deutsche Bank Nat'l Trust Co. v. Lubonty*, 208 A.D.3d 142, 147 (2d Dep't 2022).

But legislative history further demonstrates the intent of the Legislature to apply §626's gatekeeping rules to shareholder derivative actions involving foreign corporations doing business in New York. In a report submitted to the Legislature in January 1961, the corporate establishment criticized the Foreign Corporation Statutes, including §§1317 and 1319, because they were designed "to regulate the internal affairs of foreign corporations." Bill Jacket, L 1961, ch. 855, *Joint Report*, at 32–35. Before the passage of Article 13, the corporate establishment "strongly urged" the Legislature "that foreign corporations should be subject to and regulated by the law of the jurisdiction of incorporation, not by the law of New York." Robert

S. Stevens, *New York Business Corporation Law of 1961*, CORNELL L. REV., Vol. 47, Issue 2, 141, at 172 (Winter 1962). Despite the corporate establishment's urging, the Legislature enacted §1319 to impose §626—New York's "conditions precedent for bringing a shareholder[] derivative action"—on foreign corporations doing business here. *See* Kessler, *The New York Business Corporation Law*, at 85.

Unable to quarrel with §1319's text and legislative history, Defendants resort to two red herrings. First, they say that the Joint Report was not legislative history because "the cover letter submitting the [report] to the governor's office … includes a handwritten notation stating 'opposition later withdrawn.'" Answering Br. at 15 & n.2. But whether or not the corporate establishment's report was withdrawn is immaterial. What matters is that the report was submitted to the Legislature at the time of Article 13's passage, and that it reflects the Legislature's intent—as understood by the corporate establishment—to impose New York's gatekeeping rules governing shareholder derivative actions on foreign corporations doing business here. *See Woollcott v. Shubert*, 217 N.Y. 212, 221 (1916) (legislative history includes "contemporaneous events" at the time of enactment).

Second, Defendants assert that §1319 is not a choice-of-law provision. But the title of §1319—"[a]pplicability of other [BCL] provisions"—indicates that the provision aims to direct the application of New York law. The phrase "shall apply" in §1319(a) manifests the Legislature's intent to impose certain BCL provisions,

including §§626–627, "to a foreign corporation doing business in this state." N.Y. BUS. CORP. LAW §1319(a). Where, as here, the text of the statute is clear and unambiguous, courts must follow the statutory directive. *Majewski*, 91 N.Y.2d at 583. In fact, this Court in *Culligan* did exactly that—construing §1319 as to direct that "New York law applies" to derivative claims brought on behalf of a foreign corporation. *See* 118 A.D.3d at 423.

Defendants' erroneous assertion—contrary to *Culligan*—originates from *Lewis v. Dicker*, where the Kings County Supreme Court held—as a "matter of first impression" and without analysis—that §1319 "is not a conflict of laws rule, and [thus] does not compel the application of New York law." *See* 118 Misc. 2d 28, 30 (Sup. Ct. Kings Cnty. 1982). *Lewis*'s unreasoned conclusion was repeated in *City of Aventura Police Officers' Retirement Fund v. Arison*, 70 Misc. 3d 234 (Sup. Ct. N.Y. Cnty. 2020). And these decisions were reported in the three commentaries cited by Defendants (*see* Answering Br. at 13). But an erroneous conclusion—reached without analysis—remains erroneous, regardless of how many times it gets repeated. *Lewis*'s conclusion that §1319 is not a choice-of-law provision conflicts with statutory text and *Culligan*.[3] This Court must reject it.

[3] Likewise inapposite is *City of Philadelphia Board of Pensions & Retirement v. Winters*, Index No. 601438-20, slip op. (Sup. Ct. Nassau Cnty. Feb. 3, 2022) (R1240–1252). That decision did not address whether BCL §626's derivative standing requirement displaces English law's standing requirement. Nor did *City of Philadelphia* address whether §1319 displaces the internal-affairs doctrine with respect to New York's gatekeeper rules governing derivative actions.

Unable to refute §1319's directive, Defendants argue that nothing in the Foreign Corporation Statutes bars application of "additional standing requirements [from foreign law] beyond New York's baseline standards." Answering Br. at 14. But the ECA's "membership" requirement is not just an "*additional*" requirement—it conflicts with §626's grant of derivative standing to all beneficial owners of the companies. Where, as here, an actual conflict exists between the laws of different jurisdictions, a choice-of-law decision is necessary. *Allstate Ins. Co. v. Stolarz*, 81 N.Y.2d 219, 223 (1993). And §626 "shall apply." N.Y. BUS. CORP. LAW §1319(a).

Defendants' argument is also illogical because, if the ECA's conflicting membership requirement is made applicable, §626 would become toothless. The imposition of §626's gatekeeping rules on foreign corporations reflects the New York Legislature's judgment in balancing "the interests of shareholders, management, employees, and the overriding public interest." Stevens, *New York Business Corporation Law of 1961*, at 172. The Legislature decided to confer standing to bring derivative actions to all "holder[s] of shares … or of a beneficial interest in such shares"—regardless of whether such holders have standing to bring derivative actions under foreign law. *See* N.Y. BUS. CORP. LAW §626(a). As Professors DeMott and Kessler observed, this is part of the statutory scheme to regulate certain aspects of the "internal affairs" of foreign corporations doing business in New York. Deborah A. DeMott, *Perspectives on Choice of Law for*

Corporate Internal Affairs, 48 LAW & CONTEMPORARY PROBLEMS 161, at 164 (1985); *see also* Kessler, *The New York Business Corporation Law*, at 107 n.418.

Arguing the contrary, Defendants attempt to muddy these scholarly observations. *See* Answering Br. at 16–17 n.4. Contrary to Defendants' argument, Professor DeMott cited §1319 as a basis to apply New York's "special requirements on derivative litigation" to "specified internal affairs questions in certain foreign corporations." DeMott, *Perspectives on Choice of Law for Corporate Internal Affairs*, at 164 & ns.22–24. Likewise, Professor Kessler referenced BCL "§§1318–20" as one of the "areas" in which the Legislature intended to "subject[] foreign corporations to the same standards as local corporations." Kessler, *The New York Business Corporation Law*, at 107 n.418.

The Court must therefore reject Defendants' argument.

2. As Held in *Culligan*, the Common-Law Internal-Affairs Doctrine Must Give Way to BCL §1319's Statutory Mandate, and the Application of §626 Requires a Finding That Plaintiff Has Standing to Bring This Derivative Action

Just like this case, *Culligan* involved a shareholder derivative action brought on behalf of a foreign corporation. *See* 118 A.D.3d at 422. In *Culligan*, this Court held that "*the issue of plaintiffs' standing to bring a derivative action is governed by* [*New York*] *law*," because BCL §§1317 and 1319 displaced the internal-affairs doctrine, rendering the doctrine inapplicable to "claims based on sections of the [BCL] enumerated in [§§1317 and 1319]." *Id*.

Culligan is the *only* New York appellate decision on the books interpreting §1319 with respect to §626's gatekeeping rules governing shareholder derivative actions.[4] *Culligan* is on-point. And *Culligan* is binding. The lower court's failure to follow *Culligan,* standing alone, requires reversal.

Arguing the contrary, Defendants mischaracterize *Culligan* as "overturn[ing] decades of settled precedent … applying the internal-affairs doctrine in shareholder derivative actions brought on behalf of foreign corporations." Answering Br. at 17. But this Court did no such thing in *Culligan*. This Court in *Culligan* refused to apply the internal-affairs doctrine because the Legislature, via BCL §1319, mandated the application of §626 on the issue of a shareholder's standing to bring derivative claims. *See* 118 A.D.3d at 422–23; *see also* RESTATEMENT (SECOND) OF CONFLICTS OF LAW §6(1), Cmt. b (1988) ("the court will apply a local statute in the manner intended by the legislature").

[4] Like this Court in *Culligan,* federal courts have held that §1319 mandated the application of §626 to shareholder derivative actions brought on behalf of foreign corporations doing business in New York. *Norlin Corp. v. Rooney, Pace, Inc*., 744 F.2d 255, 261 (2d Cir. 1984); *Stephenson v. Landegger*, 337 F. Supp. 591, 593 (S.D.N.Y. 1971), *aff'd*, 646 F.2d 133 (2d Cir. 1972). Defendants' attempt to distinguish *Norlin* is misleading. In *Norlin*, the Second Circuit's decision to apply §626—and to reject the internal-affairs doctrine with respect to the shareholder's standing to bring derivative claims—turned on the interpretation of §1319. *See* 744 F.2d at 261. That decision did not, as Defendants assert (Answering Br. at 21 n.9), turn on *Greenspun v. Lindley*, 36 N.Y.2d 473 (1975). In any event, contrary to Defendants' assertion, §1319 applies to all "foreign corporation[s] doing business in [New York]," as its text commands, regardless of whether such corporations' presence in New York is "significant." *See* N.Y. BUS. CORP. LAW §1319(a).

All of this Court's precedents cited by Defendants (*e.g.*, *Hart* and *Lerner*)[5] applied the internal-affairs doctrine outside the context of BCL §1319. *Culligan* is completely in line with these precedents with respect to the validity and applicability of the internal-affairs doctrine, where no statutory directives command the application of New York law. Defendants' attempt to manufacture a conflict between *Culligan* and the *Hart-Lerner* line of cases must be rejected.

* * *

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

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

B. The Lower Court Failed to Follow *Davis* and *HSBC*'s Directive to Apply New York's Gatekeeping Rules Governing Derivative Actions in New York Courts

Davis and *HSBC* command that BCL §626—New York's own gatekeeping rules—be applied to this action because the ECA's membership requirement is procedural and thus applicable only to shareholder derivative actions brought in English courts.[6] Opening Br. at 48–52.

Urging the Court to depart from *Davis* and *HSBC*, Defendants make two procedural arguments, both of which should be rejected. First, Defendants claim waiver. But Plaintiff did not waive this procedural-versus-substantive argument because it cited both *Davis* and *HSBC* in its opposition to Defendants' motion to dismiss. R925, 941. Second, Defendants say that Plaintiff has admitted in its FAC that the ECA's membership requirement is substantive. Not so. Paragraph 91 of the FAC (R776–778) cited by Defendants expressly states that the ECA "contains *both procedural* and substantive provisions." R776.

Procedural defects aside, Defendants' argument for departing from *Davis* and *HSBC* is substantively meritless. The title of Chapter 1, Part 11 of the ECA ("Derivative Claims in England …") and the text of §260 ("[t]his Chapter applies to proceedings in England … by a member of a company") conclusively establish that

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

the membership requirement is procedural and applicable only to proceedings in the United Kingdom. *Davis*, 30 N.Y.3d at 253–54. And *HSBC* precludes the application of the ECA's membership requirement to a derivative action brought in a New York court. 166 A.D.3d at 757.

Defendants' attempt to limit *HSBC* to only ECA §261 is wrong because all four sections (§§260–264) in Chapter 1 must "construed as a whole and … its various sections must be considered together and with reference to each other." *People v. Mobil Oil Corp.*, 48 N.Y.2d 192, 199 (1979). Even *City of Aventura*—the sole legal support cited by Defendants—recognizes that *HSBC* "could … be read broadly to indicate that all provisions contained in Part 11, Chapter 1 of the [ECA], including that the action be brought by a 'member,' are procedural." *See* 70 Misc. 3d at 250. Defendants' unduly limited interpretation of *HSBC* should be rejected.

Defendants' remaining arguments based on the right-versus-remedy and policy factors fare no better. Chapter 1 (ECA §§260–264) addresses the remedy—procedural in nature—for a member of the company to apply for court permission (in the United Kingdom) to "continue [a] claim as a derivative claim." *See* THE COMPANIES ACT 2006 §261. This membership requirement is associated with a remedy—not a right. *See Davis*, 30 N.Y.3d at 255–56 & n.9. Nor would interpreting Chapter 1 as procedural implicate any policy concerns with respect to comity because it would impose no burden on any United Kingdom courts. *See id.* at 256.

Defendants' speculation about forum-shopping is unfounded because, as a New York resident, Plaintiff is entitled to sue in New York courts. *See Cadet v. Short Line Terminal Agency, Inc*., 173 A.D.2d 270, 271 (1st Dep't 1991).

All told, because Defendants come up with no legal support to justify the lower court's departure from *Davis* and *HSBC*, this Court should reverse.

II. Even If the English Procedural Requirements Are Applicable, the Lower Court Erred in Resolving a Factual Issue at the Pleadings Stage Based on Hearsay Statements

The lower court erred in departing from the basic rules of pleading and in exceeding the proper scope of review under CPLR 3211. Opening Br. at 52–55. Specifically, the lower court failed to assume the truth of Plaintiff's verified allegation that its "shares are registered with Barclays and [it] is hence a 'member of the company'" (R750 (¶30)). *See Godfrey v. Spano*, 13 N.Y.3d 358, 373 (2009); *see also* CPLR §105(u). And the lower court relied on Ellwood's hearsay statements in her affidavit, which are outside the pleadings. *See Flowers v. 73rd Townhouse LLC*, 99 A.D.3d 431, 431 (1st Dep't 2012). These legal errors require reversal.

In an attempt to justify these errors, Defendants say that the lower court was permitted to consider affidavits under CPLR 3211(a)(7)—the ground that "the pleading fails to state a cause of action." Answering Br. at 32–33. But Defendants' request for dismissal based on the membership requirement pertains to Plaintiff's capacity to sue and has nothing to do with any elements of Plaintiff's breach-of-

fiduciary-duty claims. *See Cmty. Bd. 7 v. Schaffer*, 84 N.Y.2d 148, 155 (1994) ("[t]he concept of a lack of capacity … has … been intermingled with the analytically distinct concept of a failure to state a cause of action"). Thus, this membership issue falls outside CPLR 3211(a)(7) and, instead, falls within CPLR 3211(a)(3)—the ground that "the party asserting the cause of action has not legal capacity to sue." Defendants cite no law that permits the lower court to review affidavits on a CPLR 3211(a)(3) motion.

Nor do Defendants have an answer to the defects in the Ellwood affidavit—Ellwood lacked personal knowledge because she relied upon "reasonable enquires of [Barclays' registrar]."[7] R719. Ellwood's hearsay statements—even if they can be considered on a CPLR 3211(a) motion—are not "conclusive" evidence and thus cannot outweigh Plaintiff's verified allegation that its "shares are registered with Barclays" (R750 (¶30)). *Leon v. Martinez*, 84 N.Y.2d 83, 87–88 (1994).

All told, the lower court erred in dismissing the verified FAC based on the self-serving hearsay statements of a Barclays employee. This Court should reverse.[8]

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[7] Defendants blame Plaintiff for failing to raise evidentiary objections to the Ellwood affidavit in the lower court. But the Ellwood affidavit was submitted on a CPLR 3211 motion—consideration of which is, by design, limited to the pleadings. Plaintiff cannot be faulted for the lower court's error in exceeding its proper scope of review. Defendants' claim of waiver should be rejected.

[8] Defendants sneak in an alternative ground for affirmance based on English common law. *See* Answering Br. at 35–36. Plaintiff addressed this argument in the lower court. R941–943. Procedurally defective and substantively meritless, this far-fetched argument does not merit a response here.

III. This Court Should Refrain from Reviewing Defendants' Proposed Alternative Grounds for Affirmance Because They Raise Factual Issues That Are Subject to an Abuse-of-Discretion Review and Are Suitable for Resolution by the Lower Court in the First Instance

Appellate generally decline to reach alternative grounds that the lower court did not. *See Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 553 (2001). As the Court of Appeals recognized in *Rushaid v. Pictet & Cie*, the rationale for declining to review alternative grounds for affirmance is two-fold. *See* 28 N.Y.3d 316, 332 (2016).

First, review should be declined if the proposed alternative grounds are "addressed to the [lower] court's discretion." *Id*. In *Rushaid*, the trial court did not reach defendants' argument for dismissal based on *forum non conveniens*. *Id*. Because a *forum-non-conveniens* ruling would be subject to an abuse-of-discretion review, the Court of Appeals decided to allow the trial court to address the matter in the first instance. *Id*.

Second, review should be declined if the proposed alternative grounds involve fact-intensive inquiries. *Id*. In declining to consider defendants' *forum-non-conveniens* arguments in *Rushaid*, the Court of Appeals reasoned that such consideration would "'requir[e] the balancing of many factors in light of the facts and circumstances of the particular case.'" *Id*. The Court of Appeals also noted that the lack of discovery with respect to the *forum-non-coneniens* factors weighed in favor of declining review. *Id*.

Rushaid's reasoning applies here and precludes this Court from considering Defendants' three proposed alternative grounds for affirmance: (1) whether Barclays is "doing business" in New York within the meaning of BCL §1319; (2) whether the FAC satisfies §626's pleading requirements; and (3) whether the FAC should be dismissed based on *forum non conveniens*.

Resolution of all three issues requires a fact-intensive inquiry. *See, e.g.*, *Charles Abel, Ltd. v. Sch. Pictures, Inc.*, 40 A.D.2d 944, 944 (1972) (factual inquiry is necessary to determine whether defendant is "doing business in New York"); *Trump v. Cheng*, 2009 N.Y. Misc. LEXIS 5343, at *11 (Sup. Ct. N.Y. Cnty. Jan. 6, 2009) ("the demand futility 'analysis is fact-intensive'"). And the lower court's decisions with respect to demand futility under BCL §626 and inconvenient forum under CPLR 327(a) are subject to an abuse-of-discretion review. *See Marx v. Akers*, 88 N.Y.2d 189, 193–94 (1996) (reviewing the trial court's demand-futility finding on abuse of discretion). Of course, *Rushaid* is binding and bars review of Defendants' *forum-non-conveniens* arguments.[9] 28 N.Y.3d at 332.

Accordingly, this Court must refrain from considering all three alternative grounds for affirmance proposed by Defendants.

[9] Defendants move to strike the portion of the record and Plaintiff's brief relating to CPLR 327(b)'s prohibition against dismissal based on *forum non conveniens* (Point V.C.1., *infra*). Defendants are effectively seeking to deprive this Court of a full record to review their *forum-non-conveniens* arguments. In any event, the lower court has already expressed skepticism over these arguments. *See* R47 (*forum-non-conveniens* arguments "made by New York based defendants" are "a little difficult to swallow").

IV. This Court Should Reject Defendants' Alternative Grounds for Affirmance, Even If They Can Be Properly Considered

A. Plaintiff Has Sufficiently Alleged That Barclays Is Doing Business in New York

The verified FAC is replete with allegations demonstrating that (1) Barclays maintains a multi-billion-dollar operation through its New York-based subsidiaries, including defendant-respondent Barclays Capital Inc. ("BCI"); (2) Barclays owns billions of dollars of assets located in New York, including real property; (3) Barclays' American Shares are held by JPMorgan in New York (as depositary) and traded on the NYSE; (4) Barclays has consented to the jurisdiction of New York courts in its agreement with JPMorgan and has litigated in New York courts numerous times; and (5) Barclays is regulated by New York authorities and has repeatedly been fined by the NYAG and the NYDFS. R750–752 (¶¶31–35); R785–787 (¶¶100–103); R817–818 (¶162); R822 (¶171); R836–840 (¶¶197, 202); R887–888 (¶289); R892–899 (¶¶297–311).

The record further shows that (1) Barclays exerts control over its subsidiaries; (2) Barclays' officers regularly make presentations to securities analysts in New York; (3) Barclays' Board and its Board committees have held over 15 meetings in New York between 2010 and 2019; and (4) Barclays and its subsidiaries have entered into multiple settlement agreements and consent orders, as pleaded in the FAC, that contain provisions consenting to jurisdiction in New York courts. R972–

973; R974; R1264; R1321–1392; R1337–1338; R1393–1424; R1481–1546.

These allegations are more than enough to satisfy BCL §1319's "doing business" standard set forth in *Airtran N.Y., LLC v. Midwest Air Grp., Inc*., 46 A.D.3d 208 (1st Dep't 2007). *See, e.g.*, *Bryant v. Finnish Nat'l Airline*, 15 N.Y.2d 426, 432 (1965) (holding that a foreign corporation was "doing business in New York" because it managed a New York office with several employees, sold products, and promoted businesses in New York); *see also* Opening Br. at 39–46.

Arguing the contrary, Defendants raise two meritless defenses. First, Defendants say that Plaintiff's allegations are insufficient under the "heightened doing business" standard associated with BCL §1312. Even if §1312's heightened standard is applicable, Plaintiff's allegations of Barclays' multi-billion-dollar operations in New York are more than enough to show "systematic and regular activities" under any standard.[10] *See Elish v. St. Louis Sw. Ry. Co*., 305 N.Y. 267, 270 (1953) (holding that a foreign corporation was "doing business in New York" because it maintained an office and held one annual board meeting in New York).

Moreover, as this Court held in *Airtran*, provisions in Article 13, such as §1315, do not "'impose[] unjustified burdens on interstate commerce'" because any

[10] Defendants are wrong to argue that, by proposing the "traditional standard" under *Airtran*, Plaintiff has waived any arguments for meeting the "heightened standard." Answering Br. at 39–40. All the facts showing that Barclays conducts business in New York are pleaded and included in the record. Nothing is waived.

"slight burden" they impose "is adequately justified by the legitimate local interest in protecting local shareholders.'" *See* 46 A.D.3d at 215. Thus, §1312's heightened standard is inapplicable. In any event, Plaintiff's allegations satisfy either standard set forth in *Airtran*. The Court should reject Defendants' argument.

Second, Defendants say that the fact that Barclays' subsidiaries conduct business in New York is insufficient to establish that Barclays—the holding company—does business here. As a holding company controlling its New York-based subsidiaries, Barclays is presumed to be "sufficiently involved in the operation of the subsidiaries to become subject to jurisdiction." *Airtran*, 46 A.D.3d at 219. Here, the showing of control by Barclays of its subsidiaries is overwhelming.[11] *See*, *e.g.*, R892–897 (¶¶297–311); R937; R985; R1028; R1033. Defendants' holding-company dodge fails.

All told, Plaintiff has sufficiently alleged that Barclays does business in New York under §1319. *See Bryant*, 15 N.Y.2d at 432. The Court should reject Defendants' attempt to escalate this simple issue of pleading into a factual dispute.

[11] *Daimler AG v. Bauman*, 571 U.S. 117 (2014), is inapposite because there, the foreign parent had only slim contacts with the forum state, and the alleged misconduct occurred outside the forum state.

B. Plaintiff's Allegations Satisfy BCL §626's Requirements

1. Plaintiff Has Sufficiently Alleged Its Contemporaneous and Continuous Ownership of Barclays Stock

In the verified FAC, Plaintiff alleges that it has owned Barclays shares "for years and during Defendants' continuous common course of misconduct[.]" R750 (¶30). Plaintiff's verification also states that it "has continuously held shares of Barclays at times relevant in the [verified FAC]." R905. These verified allegations are sufficient to satisfy BCL §626(b)'s requirement and CPLR 3014. *See Karfunkel v. USLIFE Corp*., 116 Misc. 2d 841, *aff'd*, 98 A.D.2d 628 (1st Dep't 1983) (an "inference of continuous ownership" is sufficient).

Defendants attack these allegations as vague. But this is an impermissible attempt to impose a particularity requirement that is nowhere to be found in §626's text. *Cf.* N.Y. BUS. CORP. LAW §626(c) (requiring pleading with "particularity" only with respect to demand futility). The Second Circuit has held that allegations of stock ownership are subject only to a notice-pleading requirement. *Galdi v. Jones*, 141 F.2d 984, 992 (2d Cir. 1944). The only case cited by Defendants, *Smith v. Stevens*, 957 F. Supp. 2d 466 (S.D.N.Y. 2013), is inconsistent with *Galdi*. *Smith* is also distinguishable because there was evidence that plaintiff in that case could not meet the contemporaneous ownership requirement. *Id.* at 469–71. Absent legal support, Defendants' argument should be rejected.

2. Plaintiff Has Sufficiently Alleged Demand Futility

Demand is futile when a majority of directors is incapable of making an impartial decision as to whether to bring suit. *Bansbach v. Zinn*, 1 N.Y.3d 1 (2003). Plaintiff has alleged sufficient facts to show demand futility.

In finding demand futility, the court in *HSBC* stressed the long duration and seriousness of the egregious wrongdoing permitted by the board, as well as the "payment in excess of $1.5 billion in penalties to authorities." *See* 166 A.D.3d at 758–59. As in *HSBC*, Plaintiff alleges a decade-long pattern of admitted oversight failures. The wrongdoing here is more egregious, extensive, lasted as long and resulted in over $18 billion in penalties. R734 (¶4). If demand was excused in *HSBC*, it is excused here.

While the composition of the Board evolved as this pattern of misconduct has unfolded, inadequate Board oversight and supervision were a constant. R872 (¶257). The most dominant current directors have for years sat on the key Board committees (Audit, Risk and Nominations), which had specific responsibilities for the control and supervision failures involved. *Id*. These are the key directors—the most long-serving and powerful members who dominate the Board and will prevent any honest investigation or evaluation of legal action (against them) by Barclays. *See* R742–743 (¶20); R877 (¶265); R775 (¶89); R854–862 (¶¶228–238). The directors' personal interest, their failure to inform themselves, and their toleration of egregious

misconduct are pleaded in detail. *See* R865–890 (¶¶248–293).

In addition, Plaintiff alleges a pattern of suppression of whistleblowers inside Barclays who tried to bring wrongdoing to light. Several whistleblowers were punished as the directors obstructed regulatory and internal investigations of wrongdoing, demonstrating embedded hostility to holding wrongdoers at Barclays personally accountable. R890 (¶293).

Barclays has been repeatedly sanctioned for, and ordered to cease from, its anti-whistleblower misconduct. R887 (¶¶287–288). But Barclays' current CEO (Staley) was caught attempting to punish whistleblowers—conduct contrary to banking regulations and a New York Consent Decree. R854–862 (¶¶228–238). The New York regulators found that he "breached the standard of care expected of a CEO" and Barclays conducted its banking business in an "unsafe and unsound manner by failing to devise and implement effective governance and controls with respect to its whistleblowing program." R887–889 (¶¶289–291).

Detailed and particularized, these allegations, viewed as a whole, are more than sufficient to satisfy §626(c). *See Marx*, 88 N.Y.2d at 200–01.

C. Defendants Are Precluded by CPLR 327(b) from Raising a *Forum-Non-Conveniens* Defense and, in Any Event, Fail to Carry Their Heavy Burden of Showing Inconvenience and Oppression Necessary to Support Such a Defense

1. The Lower Court Lacks Power to Grant a CPLR 327(a) Motion Because This Action Arises out of and Relates to Agreements and Undertakings Falling Within GOL §5-1402's Purview

The texts of CPLR 327 and GOL §5-1402 manifest New York's public policies of asserting jurisdiction over (1) foreign persons and entities that have, by any contract valued at $1 million or more, consented to the jurisdiction of New York courts and to the application of New York law; and (2) cases that arise out of or relate to such contracts. N.Y. CPLR 327(b); N.Y. GEN. OBLIG. LAW §§5-1401(1), 5-1402(1). These provisions preclude New York courts from declining jurisdiction. *Nat'l Union Fire Ins. Co. v. Worley*, 257 A.D.2d 228, 230 (1st Dep't 1999).

Courts have given a broad interpretation to provisions that refer to both "arises out of" and "relates to." *In re Potoker*, 286 A.D. 733, 736 (1st Dep't 1955). As alleged in the FAC (R895 (¶303)) and demonstrated in Plaintiff's brief (Opening Br. at 44–46), Plaintiff's derivative claims "relate to" and "arise out of" multiple agreements and undertakings that fall within GOL §5-1402's purview. R1266–1320; R1321–1392; R1393–1424; R1425–1451; R1466–1480; R1481–1546. The conduct leading to the NYAG and NYDFS settlements, Barclays registration as a foreign banking corporation in New York, and its agreement with JPMorgan

concerning its American Shares, are pleaded in the FAC. *See*, *e.g.*, R890–899 (¶¶294–311). As such, the "relates-to" and "arises-out-of" test is satisfied. *See Batchelder v. Nobuhiko Kawamoto*, 147 F.3d 915, 917–19 (9th Cir. 1998) (a shareholder derivative action brought by ADR holders relates to the ADR depository agreement). The lower court lacks the power to grant a CPLR 327(a) motion.

Defendants' argument against the applicability of CPLR 327(b) conflicts with statutory text. Nothing in these provisions requires Plaintiff or any Defendant to be parties to the underlying agreements. So long as Plaintiff's derivative claims "arise out of" or are "related to" these agreements, CPLR 327(b) bars a dismissal based on "inconvenient forum." *See* N.Y. CPLR 327(b).

Defendants' waiver argument is of no moment. CPLR 327(b) addresses the court's power—taking away the power granted by subsection (a) where GOL §5-1402 is applicable. This is a purely legal question and is not waivable. *See Title Guarantee & Trust Co. v. Foxvale Realty Corp*., 287 N.Y. 147, 149 (1941) (a party may not "waive[] limitations upon the statutory power of the court").[12]

[12] In any event, Plaintiff moved to file a sur-reply to raise the CPLR 327(b) argument before the lower court. It is unfair to find a waiver here. *Lambert v. Williams*, 218 A.D.2d 618, 621 (1st Dep't 1995). *Nurlybayev v. SmileDirectClub, Inc*., 205 A.D.3d 455 (1st Dep't 2022), is distinguishable. There, the Court found waiver because the CPLR 327(b) argument was never presented to the trial court. And, in finding waiver, the Court did not consider *Title Guarantee*. Thus, *SmileDirectClub* does not require a finding of waiver here.

2. Even If the Court May Properly Consider Defendants' CPLR 327(a) Motion, They Fail to Satisfy Their Heavy Burden of Rebutting Plaintiff's Presumptive Entitlement to Sue in New York and of Showing Inconvenience and Oppression in Having to Litigate in New York

a. Plaintiff's Choice to Sue in New York Is Entitled to Presumptive Weight and Deference

Plaintiff, as a New York resident, is presumptively entitled to invoke the subject-matter jurisdiction conferred to New York courts by the Legislature. *See Cadet*, 173 A.D.2d at 271. New York courts have accorded this "presumptive[] entitle[ment]" to New York-resident shareholders who brought derivative actions on behalf of foreign corporations. *See Broida v. Bancroft*, 103 A.D.2d 88, 92 (2d Dep't 1984). "The deference owed to the forum choice of [such] plaintiffs cannot be reduced solely because they chose to invest in a foreign entity." *Otto Candies, LLC v. Citigroup, Inc.*, 963 F.3d 1331, 1339–40 (11th Cir. 2020). Moreover, a New York-resident plaintiff's choice of New York forum must be accorded extra weight where, as here, the proposed alternative forum is in a foreign country. *Swift & Co. Packers v. Compania Colombiana Del Caribe*, 339 U.S. 684, 697 (1950).

Here, Defendants must overcome the presumption for a New York forum by "establish[ing] such oppression and vexation … as to be out of all proportion to plaintiff's convenience." *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 102 (2d Cir. 2000). As discussed below, Defendants cannot carry this heavy burden.

b. Defendants Have Failed to Carry Their Burden to Overcome the Deferential Presumption of a New York Forum Because They Submitted No Evidence of Inconvenience or Hardship of Litigating in New York

In seeking dismissal under CPLR 327(a), Defendants make no showing—much less any evidentiary showing—of any hardship from defending this action in New York. Nor do Defendants submit any evidence besides a single affidavit identifying any "inconvenience."[13] Defendants' failures, standing alone, require a denial of their *forum-non-conveniens* motion. *Elmaliach v. Bank of China Ltd*., 110 A.D.3d 192, 208 (1st Dep't 2013).

Contrary to Defendants' conclusory assertions of inconvenience, many of the key witnesses and much of the evidence relevant to Plaintiff's claims are located here in New York. Billions of dollars in fines and settlements have been paid to the NYAG and the NYDFS. *See*, *e.g*., R734–735 (¶5); R817–818 (¶162), R836 (¶197), R874–876 (¶261). Key aspects of the underlying wrongdoing occurred in New York in Barclays' investment and commercial bank subsidiaries. R898–899 (¶¶311–313). Here, the nexus to New York is overwhelming. Plaintiff's showing of a substantial nexus, combined with Defendants' failure to show any hardship of litigating in New York, requires a denial of Defendants' *forum-non-conveniens* motion. *See Cadet*, 173 A.D.2d at 271.

[13] In fact, it is impossible for Defendants to make a showing of inconvenience or burden because all movants in the lower court are based in New York.

This conclusion finds ample support in case law. In *Elmaliach*, for example, Israeli victims of terrorist acts sued a Chinese bank in New York alleging that the bank facilitated the transfer of money for terrorist organizations. 110 A.D.3d at 195. Affirming a denial of the bank's *forum-non-conveniens* motion, this Court reasoned that even though the case's nexus to New York—the alleged use of "New York banking facilities"—was insufficient to justify the application of New York law, it was sufficient to justify a New York forum. *Id*. at 208–09. And in *HSBC*, the Second Department affirmed the denial of an English bank's CPLR 327 motion because the alleged "wrongdoing occurred in New York," even though plaintiff resided in England. 166 A.D.3d at 759.

The reasoning in *Elmaliach* and *HSBC* applies here—with greater force—because Plaintiff, unlike the foreign-national plaintiffs in those cases, resides in New York (R750 (¶30)). *See Thor Gallery at S. DeKalb, LLC v. Reliance Mediaworks (USA) Inc*., 131 A.D.3d 431, 432 (1st Dep't 2015) (plaintiff's residence held generally to be the most significant factor). Applying this rule, New York courts, including this Court, have consistently denied *forum-non-conveniens* motions in shareholder derivative actions that have a nexus to New York. *See*, *e.g.*, *Rocha Toussier y Asociados, S.C. v. Rivero*, 91 A.D.2d 137, 141 (1st Dep't 1983); *Laurenzano v. Goldman*, 96 A.D.2d 852, 853 (2d Dep't 1983).

Given New York's centrality to international commerce, New York courts

frequently adjudicate lawsuits involving foreign laws and foreign corporations, including shareholder derivative lawsuits. *See Duncan-Watt v. Rockefeller*, 2018 N.Y. Misc. LEXIS 1383, at **12–13 (Sup. Ct. N.Y. Cnty. Apr. 13, 2018). The application of "substantive" foreign laws to the disputes does not dictate dismissal. *See id.* Just as the Second Department held in *Broida*, a New York plaintiff's choice to sue derivatively on behalf of a foreign corporation in New York must be given deference and must not be disturbed absent a substantial showing by defendants of hardship and injustice. 103 A.D.2d at 91–92. Just like the nominal defendant in *Broida*, Barclays and its subsidiaries are frequent litigants in New York courts. R892 (¶297); R970–971. "It ill behooves [Barclays and Defendants] to now urge the contrary" in a *forum-non-conveniens* motion. *Broida*, 103 A.D.2d at 92–93.

Defendants' *forum-non-conveniens* motion is meritless and should be denied.

V. The Court Should Deny BCI's Request for Dismissal Because Plaintiff Has Sufficiently Alleged BCI's Role in the Underlying Misconduct

In a complete disregard of Plaintiff's allegations and basic rules of pleading, Defendants seek dismissal of BCI—Barclays' New York-based operating subsidiary. They assert that Plaintiff alleges neither misconduct of nor duties owed by BCI. Answering Br. at 55. But this assertion contradicts Plaintiff's allegations:

> 32. … *Barclays Capital is named as a defendant because its directors and officers participated in the wrongdoing and it was an instrumentality used by certain defendants to commit the misconduct and violations of duty complained of.* …

R750–751 (¶32). Specifically, Plaintiff alleges that six individual defendants—Robert Diamond (R757 (¶47)), Robert Le Blanc (R766–767 (¶68)), John Carroll (R767 (¶70)), Jerry del Missier (R768 (¶71)), Roger Jenkins (R769–770 (¶74)), and Richard Ricci (R771 (¶78))—occupied management positions at BCI during the relevant period. Plaintiff further alleges that BCI had been a target of enforcement proceedings brought by regulators, and had paid hundreds of millions of dollars in fines for the misconduct giving rise to Plaintiff's derivative claims. *See, e.g.*, R821–822 (¶170); R834–835 (¶194); R840–841 (¶203); R843 (¶207).

In light of these allegations regarding BCI's role in Defendants' underlying misconduct, the lone case cited by Defendants—*Fletcher v. Boies, Schiller & Flexner, LLP*—is inapposite because plaintiff in *Fletcher* "pleaded no wrongdoing by" all but one defendant. *See* 75 A.D.3d 469, 470 (1st Dep't 2010). In fact, at the pleadings stage, Plaintiff's allegations must be "presumed to be true and accorded every favorable inference." *Godfrey*, 13 N.Y.3d at 373.

Accordingly, the Court should deny Defendants' request to dismiss BCI.

CONCLUSION

This Court should reverse and remand with instructions to deny Defendants' motion to dismiss the FAC.

Dated: New York, New York
March 31, 2023

Respectfully submitted,

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