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

Court of Appeals

of the

State of New York

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

Plaintiff-Appellant,

– 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,

(For Continuation of Caption See Inside Cover)

MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA TO APPEAR AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS-RESPONDENTS

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LAURA PADOVANI and BARCLAYS CAPITAL INC.,

Defendants-Respondents,

– and –

BARCLAYS PLC,

Nominal Defendant-Respondent.

PLEASE TAKE NOTICE that, upon the annexed affirmation of Michael C. Keats, dated October 28, 2024, and the accompanying proposed brief, proposed *amicus curiae* The Chamber of Commerce of the United States of America ("U.S. Chamber") will move this Court on November 18, 2024, or as soon thereafter as counsel may be heard, at Court of Appeals Hall, 20 Eagle Street, Albany, New York 12207, for an order pursuant to Rule 500.23 of the Rules of Practice of the Court of Appeals of the State of New York granting the U.S. Chamber leave to file the accompanying brief as *amicus curiae* in support of Defendants-Respondents in the above-captioned appeal, and for such other and further relief as the Court may deem just and proper.

Dated: October 28, 2024
New York, New York

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 500.1(f) of the Rules of Practice of the Court of Appeals of the State of New York, The Chamber of Commerce of the United States of America ("U.S. Chamber") certifies that it has no parent corporation. The U.S. Chamber is affiliated with the Center for International Private Enterprise and the U.S. Chamber of Commerce Foundation. Its subsidiaries include CC1, LLC; CC2, LLC; USIBC Global Private Limited; Article III Films, LLC; and Madison County Record, LLC.

STATE OF NEW YORK
COURT OF APPEALS

EZRASONS, INC., as a shareholder of BARCLAYS PLC derivatively on behalf of BARCLAYS PLC, *Plaintiff-Appellant*, - against - SIR NIGEL RUDD *et al*., *Defendants-Respondents*, - and - BARCLAYS PLC., *Nominal Defendant-Respondent.*	APL-2024-00016 Appellate Division, First Department Case No. 2022-04657 New York County Clerk's Index No. 656400/20

AFFIRMATION OF MICHAEL C. KEATS IN SUPPORT OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA'S MOTION FOR LEAVE TO APPEAR AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS-RESPONDENTS

MICHAEL C. KEATS, an attorney admitted to practice in the courts of the State of New York, and not a party to this action, hereby affirms under penalty of perjury pursuant to CPLR 2106 the following:

1. I am a member of the law firm of Fried, Frank, Harris, Shriver & Jacobson LLP, attorneys for proposed *amicus curiae* The Chamber of Commerce of the United States of America ("U.S. Chamber") in the above-captioned appeal. I respectfully submit this affirmation in support of the U.S. Chamber's motion to appear as *amicus curiae* in support of Defendants-Respondents in this appeal. A copy of the U.S. Chamber's proposed brief is attached hereto as Exhibit A.

2. The U.S. Chamber is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country.

3. One of the U.S. Chamber's important functions is to represent the interest of its members in matters before Congress, the Executive, and the courts. To that end, the U.S. Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the Nation's business community.

4. The U.S. Chamber and its members have a strong interest in the above-captioned case because it concerns the application of New York's "internal-affairs doctrine," a longstanding and critical choice-of-law rule pursuant to which legal relationships between a company and its directors and shareholders are generally governed by the substantive law of the company's jurisdiction of incorporation, to the question of derivative standing—whether a shareholder has the right to sue on behalf of a corporation for breach of fiduciary duty, among other things. This case presents an important question for the U.S. Chamber and its members because there is a heightened concern that allowing plaintiffs to dictate the substantive legal standards that govern derivative litigation based on where they choose to file suit will lead to forum shopping and upset the reasonable and well-settled expectations of corporations and investors that corporate-governance litigation will be governed by the law of their incorporating jurisdiction. To that end, the U.S. Chamber moves to appear as *amicus curiae* in support of Defendants-Respondents to explain the legal and public-policy interests supporting the conclusion that, as courts uniformly have recognized, derivative standing is a substantive issue of law to which the internal-affairs doctrine applies.

5. Pursuant to Rule 500.23(a)(4)(i) of the Rules of Practice of this Court, the Court should grant the U.S. Chamber permission to appear as *amicus curiae* because the U.S. Chamber can help identify law or arguments that might otherwise escape the Court's consideration, given its extensive practical experience advocating on behalf of its members and their constituencies engaged in interstate business nationwide.

6. Pursuant to Rule 500.23(a)(4)(iii) of the Rules of Practice of this Court, I certify the following:

a. No party's counsel contributed content to the U.S. Chamber's proposed *amicus curiae* brief or otherwise participated in this brief's preparation in any other manner.

b. No party or its counsel contributed money that was intended to fund the preparation or submission of this brief.

c. No person or entity, other than the movant or its counsel, contributed money that was intended to fund the preparation or submission of this brief.

I affirm this 28th day of October 2024, under the penalties of perjury under the laws of New York, which may include a fine or imprisonment, that the foregoing is true, and I understand that this document may be filed in an action or proceeding in a court of law.

Michael C. Keats

EXHIBIT A

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BRIEF FOR *AMICUS CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF DEFENDANTS-RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America ("U.S. Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. One of the U.S. Chamber's important functions is to represent the interest of its members in matters before Congress, the Executive, and the courts. To that end, the U.S. Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the Nation's business community.

This case concerns New York's "internal-affairs doctrine," a longstanding and critical choice-of-law rule widely applied throughout the United States, pursuant to which legal relationships between a company and its directors and shareholders are generally governed by the substantive law of the company's jurisdiction of incorporation, rather than the law of the forum in which a plaintiff chooses to file suit. This case presents an important question for the U.S. Chamber because allowing plaintiffs to dictate the substantive legal standards that govern derivative

[1] Pursuant to Rule 500.23(a)(4)(iii), *amicus curiae* states that no party's counsel contributed content to this brief or otherwise participated in the preparation of this brief, and no party, party's counsel, or other person or entity other than amicus, its members, and its counsel contributed money that was intended to fund the preparation or submission of this brief.

litigation will lead to forum shopping and upset the reasonable and well-settled expectations of corporations and investors that corporate-governance litigation will generally be governed by the law of the incorporating jurisdiction. This Court previously reaffirmed that general proposition as recently as this year in *Eccles v. Shamrock Capital Advisors, LLC*, 2024 WL 2331737, at *7 (N.Y. May 23, 2024). Plaintiffs here, however, wish to sidestep that decision by arguing that *derivative standing*—the requirements that a shareholder of a corporation must meet in order to sue on behalf of that corporation for breach of fiduciary duty, among other things, in a New York court—is purely an issue of *procedural* law to which the internal-affairs doctrine does not apply and New York law governs. The U.S. Chamber respectfully offers this brief to explain the legal and public-policy interests supporting the conclusion that, as courts uniformly have recognized, derivative standing is a substantive issue of law that goes to the core of a corporation's internal affairs because it specifically addresses when and if a shareholder is permitted to bring suit in the name and on behalf of the corporation.

QUESTION PRESENTED

Whether the question of a shareholder's standing to assert a derivative claim on behalf of a foreign corporation is governed by the law under which the corporation is organized by virtue of the internal-affairs doctrine, or whether New York substantive derivative-standing law governs.

PRELIMINARY STATEMENT

Few legal doctrines are as universally respected by federal and state courts in the United States as the internal-affairs doctrine. This Court reaffirmed this as recently as May 2024 when, in *Eccles v. Shamrock Capital Advisors, LLC*, it noted that, except in unique circumstances, its approach is to apply the law of the state of incorporation in matters pertaining to or arising out of the internal affairs of a corporation, particularly questions of corporate governance. 2024 WL 2331737, at *7 (N.Y. May 23, 2024).[2] Plaintiff-Appellant would have this Court ignore this decades-long precedent and instead apply New York derivative-standing law based solely on the fact that a plaintiff ***chose*** to file suit in this forum, regardless of whether that case has ***anything to do with New York***. Such a result would not only directly contradict longstanding jurisprudence, but would also undermine the myriad legal and policy interests underpinning the internal-affairs doctrine.

This derivative action involves claims by Plaintiff-Appellant, which owns shares of Barclays PLC ("Barclays") common stock, against certain current and former officers, directors, and employees of Barclays and its subsidiaries for purportedly breaching their fiduciary duties. Barclays is an English company that is incorporated in and maintains its headquarters, principal place of business, and sole

[2] Unless noted, all alterations are added and internal citations and quotation marks are omitted.

office in England, and the majority of Defendants-Respondents reside in England.[3] Moreover, ***all*** of Plaintiff-Appellant's claims are based in English law, and pertain to the purported mismanagement of Barclays ***in England***.

The threshold question addressed by the lower courts in this case was whether Plaintiff-Appellant could establish derivative standing, *i.e.*, its legal entitlement to sue Barclays' officers, directors, and employees, on behalf of Barclays itself.

Plaintiff-Appellant argued that Section 1319 ("Section 1319") of the Business Corporation Law ("BCL") mandates the application of New York standing law to determine whether Plaintiff-Appellant can pursue breach of fiduciary duty claims on Barclays' behalf. BCL § 1319. Relying on that interpretation of Section 1319, Plaintiff-Appellant argued that its lawsuit should be permitted to proceed because Plaintiff-Appellant meets the requirements for derivative standing under New York law (despite the fact that it would *not* meet the standing requirements under English law). Defendants-Respondents, on the other hand, argued that the internal-affairs doctrine directs New York courts to apply the substantive law of the place of incorporation—specifically, Section 260 ("Section 260") of the U.K. Companies Act 2006, c.46 (UK) (the "Companies Act")—to determine whether the requirements for derivative standing are satisfied. Under Section 260, only

[3] Certain of Barclays' subsidiaries conduct business and maintain a presence in New York.

"member[s]" of an English corporation can bring a derivative lawsuit on behalf of the corporation. Plaintiff-Appellant is not a registered "member" of Barclays.

The New York County Commercial Division of the New York State Supreme Court (the "Commercial Division") held that the court was obliged to apply Section 260 in assessing Plaintiff-Appellant's standing to sue Barclays, and that Plaintiff-Appellant could not satisfy England's derivative-standing requirements. (R.44-48).

Relying on the longstanding internal-affairs doctrine, the Commercial Division reasoned that claims concerning actions taken by a corporation's directors, officers, or employees are governed by the substantive law of the state or country of incorporation, and thus that the question of whether Plaintiff-Appellant had standing to sue Barclays was a substantive question governed by English corporate law. (R.46). The Commercial Division ultimately concluded that, under Section 260, Plaintiff-Appellant did not have standing to pursue a derivative claim on behalf of Barclays and granted Defendants-Respondents' motion to dismiss. (R.44-45).[4] The First Department of the Appellate Division affirmed this holding. (R.1545-48).

[4] The Commercial Division also dismissed on additional grounds, holding that, based on *City of Philadelphia Board of Pensions & Retirement v. Winters*, 2022 N.Y. Slip Op. 34589(U) (Sup. Ct. Nassau Cnty. Feb. 2, 2022), English common law standing requirements are substantive and that Plaintiff-Appellant lacked standing under English common law. Like Section 260, English common law permits only members of an English corporation to bring a derivative lawsuit on the corporation's behalf (R.91-92 ¶ 32), and thus, even were Section 260 held to be procedural, Plaintiff-Appellant still does not have standing to pursue this action.

This result is consistent with a long line of decisions by the lower courts both in New York and across the United States, which have applied the internal-affairs doctrine to the question of whether shareholders in a foreign corporation could establish derivative standing in a U.S. court. Because New York courts have historically recognized that derivative standing is a question of substantive law—essentially *who* has the right to sue the company's directors in the name and on behalf of the corporation and what they must do to establish their entitlement to do so—the law of the place of incorporation has traditionally governed whether a plaintiff has derivative standing. Under this framework, and following authority from this Court, one New York court has already determined that under the internal-affairs doctrine, a derivative plaintiff pursuing an action in New York state court, on behalf of an English corporation, must meet the requirements of Section 260.

Plaintiff-Appellant has offered no valid reason why this Court should abandon decades of precedent and allow shareholders to establish derivative standing based on the law of the forum, rather than the law of the state or country of incorporation. The internal-affairs doctrine not only comports with judicial precedent, but it also serves many important legal and public-policy interests. Consistent application of the internal-affairs doctrine to questions of derivative standing promotes predictability and uniformity of result; protects the justified expectations of parties;

implements policies of the jurisdiction with the dominant interest; and promotes interstate and international systems of commerce.

For all these reasons and those set forth herein, the Court should affirm the First Department's decision and reject Plaintiff-Appellant's attempt to transform New York into a forum for foreign corporate derivative litigation that could not otherwise be maintained in the home courts of the foreign company's place of incorporation.

ARGUMENT

I. The Law of the Place of Incorporation Presumptively Applies to Substantive Legal Questions of Derivative Standing

It is well-settled that, under the internal-affairs doctrine, "the place of incorporation generally has the greatest interest in having its law apply to questions regarding the internal affairs of a corporation, such as the relationship between shareholders and directors." *Eccles*, 2024 WL 2331737, at *6; *see also First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 621 (1983). The internal-affairs doctrine has roots dating back to at least the 1960s. Since then, New York courts, as well as state and federal courts across the country, have consistently applied the internal-affairs doctrine in cases involving claims against companies incorporated outside of the forum jurisdiction.

In particular, New York courts regularly apply the internal-affairs doctrine to determine which law applies for purposes of ascertaining whether a derivative plaintiff has standing to sue a corporation in a particular jurisdiction.

A. The Internal-Affairs Doctrine Historically Has Been Applied to Determine the Applicable Law for Substantive Legal Issues

While New York law necessarily governs *procedural* questions in a legal dispute proceeding in a New York court, it does not necessarily govern *substantive* legal issues. *See Tanges v. Heidelberg N. Am., Inc.*, 93 N.Y.2d 48, 53-54 (1999); *see also Eccles*, 2024 WL 2331737, at *9. When faced with a legal dispute involving foreign corporations, or implicating jurisdictions other than New York, New York courts must determine which law to apply to substantive legal issues in that dispute—New York law or the law of another jurisdiction? To answer this question, New York courts have routinely relied on the internal-affairs doctrine. *See, e.g.*, *Zion v. Kurtz*, 50 N.Y.2d 92, 100 (1980); *Eccles*, 2024 WL 2331737, at *7 (collecting cases); *Stephen Blau MD Money Purchase Pension Plan Tr. v. Dimon*, 2015 N.Y. Slip Op. 32909(U), at *10 (Sup. Ct. N.Y. Cnty. May 6, 2015) ("[T]he First Department has repeatedly applied the internal affairs doctrine, applying the law of the state of incorporation in many derivative actions.") (collecting cases); *see also In re BP P.L.C. Deriv. Litig.*, 507 F. Supp. 2d 302, 308 (S.D.N.Y. 2007) ("While there is no mechanical application of the internal affairs doctrine in New York, courts in almost every instance when faced with a choice of law inquiry in derivative

actions alleging a breach of fiduciary duty have applied the internal affairs doctrine.").

This application of the internal-affairs doctrine is consistent with traditional conflict of laws principles. For instance, the Restatement (Second) of Conflict of Laws (the "Restatement") explains that the State that has the most significant relationship to an internal-affairs dispute will usually be the place of incorporation. Restatement (Second) of Conflict of Laws § 302(2). The Restatement sets forth a variety of factors to determine whether the "state [that has] most significant relationship" to a controversy is the place of incorporation or elsewhere. *Id.* § 6 cmt. c. These factors include (i) the needs of the interstate and international systems, (ii) the relevant policies of the forum, (iii) the relevant policies of other interested states and the relative interest of those states in the determination of the particular issue, (iv) the protection of justified expectations, (v) the basic policies underlying the particular field of law, (vi) certainty, predictability and uniformity of result, and (vii) ease in the determination and application of the law to be applied. *Id.* § 6(2). As the Restatement explains, those factors usually lead to the conclusion that the law of the place of incorporation should be the substantive law for purposes of resolving an intra-corporate dispute between shareholders and directors and/or officers. *See id.* § 302.

Today, courts have adopted a framework that tracks the principles identified so many years ago in the Restatement and generally applied since. While the internal-affairs doctrine does not *per se* apply, "the substantive law of a company's place of incorporation *presumptively* applies to causes of action arising from its internal affairs." *Eccles*, 2024 WL 2331737, at *6-7; *see also First Nat'l City Bank*, 462 U.S. at 621; *Zion*, 50 N.Y.2d at 100; *Diamond v. Oreamuno*, 24 N.Y.2d 494, 503–04 (1969); *David Shaev Profit Sharing Plan v. Bank of Am. Corp.*, 2014 N.Y. Slip Op. 33986(U), at *6-7 (Sup. Ct. N.Y. Cnty. Dec. 29, 2014) (noting the "strong public policy of New York's courts favoring the use of the 'internal affairs doctrine'"). In order to overcome this presumption and establish the applicability of the forum's substantive law, a party must show both that (1) the interest of the place of incorporation is minimal, *i.e.*, that the company has virtually no contact with the place of incorporation other than the fact of its incorporation, and (2) the forum jurisdiction has a dominant interest in applying its own substantive law. *Eccles*, 2024 WL 2331737, at *7; *see also Universal Lending Depot, LLC v. Quontic Bank*, 2024 N.Y. Slip Op. 33170(U), at *3 (Sup. Ct. N.Y. Cnty. Sept. 5, 2024) (applying *Eccles* framework). When the presumption is not successfully rebutted, the internal-affairs doctrine applies and substantive matters are governed by the law of the place of incorporation, while procedural matters are governed by the forum's procedural law. *See Eccles*, 2024 WL 2331737, at *5; *Cattan v. Rohner*, 2023 N.Y. Slip Op.

31213, at *3-4 (Sup. Ct. N.Y. Cnty. Apr. 10, 2023); *see also Haussmann v. Baumann*, 217 A.D.3d 569, 570 (1st Dep't 2023) (collecting cases), *lv. granted*, 41 N.Y.3d 934 (2024).

B. Derivative Standing Has Traditionally Been Viewed as Substantive, Not Procedural, and Therefore Governed by the Internal-Affairs Doctrine

The second part of the analysis concerns what derivative-standing law applies: the law of the place of incorporation or the forum state. Derivative standing is a substantive matter of a corporation's "internal affairs" because it "determine[s] *who* has the power to control corporate litigation" and thus "relates to the allocation of governing powers within the corporation." *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 101, 105-08 (1991) (holding that the state law of incorporation governs the demand-futility exception for shareholder derivative suits under the federal Investment Company Act); *see also* 9 William Meade Fletcher et al., *Fletcher Cyclopedia of the Law of Corporations* § 4223.50 ("The internal affairs doctrine has been applied . . . to presuit demand requirements in a shareholder derivative action.") (citing *Sagarra Inversiones, S.L. v. Cementos Portland Valderrivas, S.A.*, 34 A.3d 1074, 1081-82 (Del. 2011)).

As a result, New York courts have resoundingly considered foreign standing provisions, including the ***exact*** English law at issue in this case, to be "substantive" in nature such that, under the internal-affairs doctrine, they apply to derivative

proceedings involving foreign corporations that are filed in New York. *See City of Aventura Police Officers' Ret. Fund v. Arison*, 70 Misc. 3d 234, 236 (Sup. Ct. N.Y. Cnty. 2020) (holding that the membership requirement set forth in Section 260 "is a substantive limit on shareholder standing to assert a derivative claim" which New York courts are obliged to apply "under the 'internal affairs' doctrine"); *see also, e.g.*, *Winters*, 2022 N.Y. Slip Op. 34589(U), at *11 (holding that, in a derivative action commenced by a shareholder in New York involving an English corporation that proceeds outside the Companies Act, the issue of standing is governed by English common law); *Lerner v. Prince*, 119 A.D.3d 122, 126-27 (1st Dep't 2014) (finding that under New York State's choice-of-law rules, the substantive law of the state of incorporation governs compliance with the demand requirement); *Matter of Hakimian v. Bear Stearns & Co.*, 46 A.D.3d 294, 295 (1st Dep't 2007) ("Whether the investors had standing to sue on behalf of the hedge fund, . . . was to be determined by the law . . . where the entity was organized."); *Matter of CPF Acquisition Co. v. CPF Acquisition Co.*, 255 A.D.2d 200, 200 (1st Dep't 1998) (applying Delaware derivative-standing law); *Graczykowski v. Ramppen*, 101 A.D.2d 978, 979 (3d Dep't 1984) (same); *see also Hart v. Gen. Motors Corp.*, 129 A.D.2d 179, 183 (1st Dep't 1987), *lv denied*, 70 N.Y.2d 608 (1987); *In re Renren Deriv. Litig.*, 2020 NYLJ LEXIS 961, at *81-82 (Sup. Ct. N.Y. Cnty. June 2, 2020); *Dragon Invs. Co. II LLC v. Shanahan*, 2007 N.Y. Slip Op. 33688(U) (Sup. Ct. N.Y.

Cnty. Nov. 2, 2007); *Cent. Labs.' Pension Fund v. Blankfein*, 111 A.D.3d 40, 45 n.8 (1st Dep't 2013). Federal courts interpreting New York law have reached a similar conclusion.[5] *See, e.g.*, *Hau Yin To v. HSBC Holdings, PLC*, 700 F. App'x 66, 68-69 (2d Cir. 2017) (summary order); *Seybold v. Groenink*, 2007 WL 737502, at *5 (S.D.N.Y. Mar. 12, 2007); *Locs. 302 & 612 of the Int'l Union of Operating Eng'rs-Emps. Constr. Indus. Ret. Tr.,* 2005 WL 2063852, at *6 (S.D.N.Y. Aug. 25, 2005) ("[B]oth the Supreme Court and Court of Appeals have found that demand rules in derivative actions are substantive. . . . [T]he issue is not just 'who' may maintain an action or 'how' it will be brought, but 'if' it will be brought. . . . No determination could be more substantive.").

This Court's prior guidance in *Davis v. Scottish Re Group Ltd.*, 30 N.Y.3d 247 (2017), is consistent with this conclusion. In *Davis*, this Court considered whether Rule 12A of the Cayman Islands Grand Court Rules ("Rule 12A"), which requires a derivative plaintiff to petition the Cayman Grand Court for leave to

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[5] Federal courts have also generally treated derivative standing requirements as substantive for purposes of the choice of law analysis set forth in *Erie R. Co. v. Tompkins*, 304 U.S. 64, 71, 78-79 (1938) (the "*Erie* doctrine"), pursuant to which federal courts sitting in diversity jurisdiction apply state substantive law and federal procedural law. Thus, state standing law generally applies to derivative actions brought in federal court. *See, e.g., Drachman v. Harvey*, 453 F.2d 722, 726-27 (2d Cir. 1971) (agreeing "that Fed. R. Civ. P. 23.1 leaves open the question of who is a 'shareholder,' and that for state causes of action, standing is determined under state substantive law"); *HFG Co. v. Pioneer Pub. Co.*, 162 F.2d 536, 541 (7th Cir. 1947) (Lindley, J., concurring) (concluding that "who constitutes a shareholder [that can bring a derivative suit] . . . is a question of substantive law, which under *Erie R. Co. v. Tompkins* . . . must be determined by the law of the state"); C. Wright & A. Miller, 7A Federal Practice & Procedure § 1826 & n.11 (collecting cases).

continue a contested derivative action, was substantive or procedural, and articulated three relevant factors for this analysis: (1) "the plain language of [the] rule," (2) whether the statute itself "creates a right," and (3) "general policy considerations." 30 N.Y.3d at 253, 255-56. Ultimately, this Court reasoned that Rule 12A is procedural based on its plain language, the fact that it does not create nor defeat a shareholder's right to bring a derivative action, and considerations of judicial efficiency. *Id.* at 253, 257. For example, Rule 12A concerns "procedures . . . specific to Cayman Islands litigation." *Id.* at 253.

Since *Davis*, New York courts have continued to analyze foreign law provisions using its framework, including the ***exact*** provision at issue in this case—Section 260. In *Arison*, more than two years after *Davis*, the First Department held that Section 260 is substantive. 70 Misc. 3d at 247. Based on the three factors articulated in *Davis*, the First Department reasoned: (1) "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"; (2) the membership requirement "shapes the substantive rights of stakeholders to sue derivatively on behalf of English corporations"; and (3) classifying the membership requirement as substantive "discourages forum shopping" and "provides stable guidance to shareholders." *Id.* at 248-55.

In holding that Section 260 is substantive, the First Department contrasted *Mason-Mahon v. Flint*, 166 A.D.3d 754, 756-57 (2d Dep't 2018), which held that a different provision of the Companies Act—the judicial permission rule set forth in Section 261 of the Company's Act ("Section 261")—was a procedural limitation that applied in New York courts. The *Arison* court explained that nothing in *Mason-Mahon* suggested that its holding applied to provisions of the Companies Act other than Section 261, and distinguished Section 260's membership requirement from Section 261's judicial permission rule, because the membership requirement "is not tied to unique procedural trappings of foreign courts" and "limitations as to the authority of a plaintiff to initiate a derivative action generally are deemed to be substantive rather than procedural." *Arison*, 30 N.Y.3d at 248-50.

Thus, consistent with *Davis*, *Arison*, and *Mason-Mahon*, Section 260 is substantive and should apply for purposes of determining whether Plaintiff-Appellant has standing to pursue its claims here in New York.

II. Applying the Internal-Affairs Doctrine to Questions of Derivative Standing Promotes Legal and Public-Policy Interests

Application of the law of the place of incorporation to determine derivative standing promotes the same interests that traditionally weigh in favor of the application of the internal-affairs doctrine more broadly to legal disputes concerning the internal affairs of a corporation. This is borne out by the cases, as described *infra*, that have applied the internal-affairs doctrine to questions of derivative

standing. Consistent application of the internal-affairs doctrine to questions of derivative standing has proven to serve many important legal and public-policy interests. Among others, these interests include (i) predictability and uniformity of result, (ii) protection of justified expectations, (iii) implementation of policies of the state with the dominant interest, and (iv) promotion of interstate and international systems of commerce.

A. Predictability and Uniformity of Result

The internal-affairs doctrine serves the interests of corporations and their internal constituencies—shareholders, directors, and officers—by ensuring that a single law governs disputes concerning corporate governance. As the court emphasized in *Hart*, "[u]niform treatment of directors, officers and shareholders . . . is an important objective which can only be attained by having the rights and liabilities of those persons with respect to the corporation governed by a single law." 129 A.D.2d at 184 (citing Restatement § 302 cmt. e); *see also id.* ("[O]nly one State should have the authority to regulate a corporation's internal affairs . . . because otherwise a corporation could be faced with conflicting demands.") (quoting *Edgar v. MITE Corp*., 457 U.S. 624, 645 (1982)). In doing so, the internal-affairs doctrine allows companies and their directors and officers to more effectively manage the affairs of the business in a manner consistent with their fiduciary obligations. It also provides companies a better sense of where they can expect legal actions to be

maintained against them (or *not* maintained against them), which can be informative to shareholders, or potential shareholders, for purposes of evaluating a company and making investment decisions, among other things.

Application of the internal-affairs doctrine to questions of derivative standing promotes predictability and uniformity in the law. Given courts in New York frequently hear business disputes involving companies incorporated in jurisdictions located throughout the U.S. and around the world, predictability and uniformity as to what law a court will apply to determine whether a plaintiff has standing to pursue a derivative action in New York is imperative. This principle is particularly important for multistate and international corporations, as they are already most at risk of being subject to suits brought in jurisdictions other than their place of incorporation.

Plaintiff-Appellant offers no compelling alternative option that adequately promotes predictability and uniformity. Plaintiff-Appellant would have the court apply Section 1319 to determine standing, but the lower courts have correctly rejected this argument. *See, e.g.*, *Arison*, 70 Misc. 3d at 244 ("New York's Business Corporation Law does not…override the internal affairs doctrine on the issue of standing to bring a derivative claim."); *David Shaev Profit Sharing Plan*, 2014 N.Y. Slip Op. 33986(U), at *5 ("Section 1319…provides a procedural basis that enables the courts in New York to assume jurisdiction of derivative actions involving foreign

corporations and to apply the applicable substantive law."); *Potter v. Arrington*, 11 Misc. 3d 962, 965-66 (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."); *Dimon,* 2015 N.Y. Slip Op. 32909(U), at *11 ("Section 1319 is a mere statutory predicate to jurisdiction - *i.e.*, it simply confers jurisdiction upon New York courts over derivative suits on behalf of out-of-state corporations; it does not require application of New York law in such suits.").

Application of Section 1319 under these circumstances would be "contrary to decades of controlling appellate precedent" and would result in instability and confusion. *Arison*, 70 Misc. 3d at 244-45; *see also Hart*, 129 A.D.2d at 183-84 ("Uniform treatment of directors, officers and shareholders . . . is an important objective which can only be attained by having the rights and liabilities of those persons with respect to the corporation governed by a single law."). It would chip away the purposes of the internal-affairs doctrine, one of which is to provide predictability to directors, officers, and shareholders about what law governs intra-corporate disputes. To illustrate, if States across the country were to adopt Plaintiff-Appellant's view and apply the law of the forum to determine derivative standing, it would be nearly impossible for a foreign corporation to know where a derivative lawsuit could be maintained against it, as the requirements for derivative standing

differ from jurisdiction-to-jurisdiction. These differences can be substantial. For instance, under Massachusetts law, a shareholder is required to make a demand on the corporation's directors before filing a derivative lawsuit, whereas in Delaware, a derivative suit can be filed without first making a demand on the corporation if the plaintiff can allege the futility of such demand. *Compare* Mass. Gen. Laws ch. 156D, § 7.42, *with* Del. Ct. Ch. R. 23.1. As another example, some States allow a shareholder to bring a derivative lawsuit if they held the corporation's shares at the time of the incident that gave rise to the lawsuit, whereas other States have a continuous ownership requirement. For example, while Delaware requires a derivative shareholder to own stock at the time of the injury and continuously throughout the lawsuit, other states like Pennsylvania do not have such a bright-line requirement. *See In re Massey Energy Co. Deriv. & Class Action Litig.*, 160 A.3d 484, 497-98 (Del. Ch. 2017).

If endorsed by this Court, Plaintiffs-Appellants' position would permit shareholders of corporations with contacts to New York, even if organized under another State's law, to evade substantive barriers to derivative litigation imposed by the other State's law. This is precisely the case here: the Commercial Division found that Plaintiff-Appellant does not meet the derivative-standing requirements under the Companies Act *or* English common law, and so Plaintiff-Appellant is instead trying to establish derivative standing under New York law. Allowing derivative

litigation to proceed under these circumstances could open up the gates to shareholder litigation against foreign companies, notwithstanding the fact that the same lawsuit could not be maintained in the place of incorporation. This uncertainty may make corporations less willing to transact business in New York.

For these reasons, applying Plaintiff-Appellant's proposed framework to derivative standing would greatly undermine the predictability and uniformity interests promoted by the internal-affairs doctrine.

B. Protection of Justified Expectations

Applying the law of the place of incorporation protects the justified expectations of the parties by applying a clearly identified law they had themselves chosen. *See Hart*, 129 A.D.2d at 184 ("In incorporating in a particular state, shareholders, for their own particular reasons, determine the body of law that will govern the internal affairs of the corporation and the conduct of their directors."). Not applying the internal-affairs doctrine to substantive issues like standing would frustrate the expectations of out-of-state and foreign corporations, as well as their directors, officers, and shareholders, who relied upon the corporation's chosen laws in conducting their business. *See* Restatement § 302 cmt. g ("[P]arties who deal with a corporation will often expect . . . that any issues that may arise between them and the corporation will be determined by the local law of the state of incorporation.").

One reason a company may choose to incorporate in a particular jurisdiction is because that jurisdiction has corporate laws, among other things, that align with the company's interests. And corporate charters often state that the laws of the place of incorporation will govern legal disputes. Foreign corporations and their fiduciaries do not expect that after incorporating in one jurisdiction, they will face a litany of derivative litigation in a multitude of unknown jurisdictions across the United States that could not otherwise be maintained in the jurisdiction in which they are incorporated. Moreover, because courts have consistently applied the internal-affairs doctrine for decades, corporations and their fiduciaries reasonably expect that courts will continue to apply the law of the place of incorporation to substantive legal issues, including the fundamental issue of whether a shareholder has standing to bring an action on behalf of the corporation in the first place. Hence, applying New York law to derivative standing could expose a non-U.S. business and its fiduciaries to costly corporate governance challenges in New York when they otherwise reasonably anticipated that such litigation could not be maintained.

Applying the internal-affairs doctrine here would not upset any reasonable expectation of shareholders. If shareholders believe that a foreign jurisdiction's substantive law governing derivative standing is unlikely to yield their desired result, then they may choose not to invest in that corporation or may choose to sell any existing financial interest. Shareholders are fully capable of protecting themselves

by selecting investments that reflect their preferences to pursue derivative actions, should it become necessary, in certain jurisdictions. Here, Plaintiff-Appellant was on notice long before the institution of this lawsuit that should circumstances arise where they wish to pursue derivative claims against Barclays in a New York court, they would likely need to meet the requirements of derivative standing under English law.

Importantly, this is not to say that aggrieved shareholders will be foreclosed from having their day in court. The internal-affairs doctrine imposes a strong presumption in favor of applying the law of the state of incorporation for purposes of determining whether a shareholder has standing to bring a derivative action. Once the derivative-standing requirements of the place of incorporation are met (assuming the presumption is not rebutted), the shareholder is free to pursue that derivative litigation in an appropriate forum.

C. Implementation of Policies of the Jurisdiction with the Dominant Interest

Generally speaking, the place of incorporation has the greatest interest in determining whether a derivative suit can be maintained. *See Hart*, 129 A.D.2d at 184-85 (noting that the place of incorporation typically has an interest "superior" to that of all other states in deciding issues concerning the internal affairs of corporations). This is typically because the amount of contacts between the corporation and the place of incorporation are the greatest. *See id.* at 185 n.3 ("[T]hat

GM has a significant number of individual and institutional shareholders in New York . . . is not controlling . . . since the corporation is the real party in interest."). For this reason, the internal-affairs doctrine generally defaults to the law of the place of incorporation to serve that jurisdiction's dominant interest.

Plaintiff-Appellant nevertheless contends that under Section 1319, New York law should provide the standard for derivative standing, because (i) New York has an interest in resolving disputes involving corporations "doing business" within its borders and (ii) shareholders should have access to New York courts. Brief for Plaintiff-Appellant at 17-36. But Plaintiff-Appellant disregards an important aspect of the internal-affairs doctrine.

Plaintiff-Appellant ignores the pre-existing analysis inherent in the internal-affairs doctrine. The internal-affairs doctrine already takes into consideration Plaintiff-Appellant's concern, as the doctrine does not mandate that the law of the place of incorporation governs substantive legal issues, including derivative standing, in *all* disputes involving the internal affairs of the corporation. Instead, as this Court articulated, the internal-affairs doctrine should apply *unless* (1) the interest of the place of incorporation is minimal, *i.e.*, the company has virtually no contact with the place of incorporation other than the fact of its incorporation, and (2) New York has a dominant interest in applying its own substantive law. *See supra* Sec.I.A; *see also David Shaev Profit Sharing Plan*, 2014 N.Y. Slip Op. 33986(U), at *7

(applying the law of the state of incorporation even though "Bank of America maintains a substantial presence and significant contacts in New York . . ."). Therefore, the internal-affairs doctrine already accounts for instances in which the place of incorporation lacks an interest in adjudicating an internal-affairs dispute and New York has the dominant interest.

This principle is borne out by the record here. The lower courts correctly determined that this was not the rare intra-corporate dispute in which the interests of New York warranted applying New York law over English law. Under the *Eccles* framework, Plaintiff-Appellant did not plead facts sufficient to show that Barclays has virtually no contact with England other than the fact of its incorporation. To the contrary, the record established Barclays' substantial ties to England—Barclays is incorporated in England and maintains its headquarters, principal place of business, and sole office in England, the majority of Barclays' board meetings from 2008-2020 were held in England, and the majority of Defendants-Respondents reside in England. (R.718-19 ¶¶ 4-6, 9-10, 13). The factual allegations do not establish that New York has the dominant interest. In fact, the record reflects that Barclays has no real estate, holds no leases, and has no employees in New York (or the United States generally). (R.719, ¶¶ 7-8). Consistent with the presumption embedded in the internal-affairs doctrine, England has the dominant interest in adjudicating and applying its law to this legal dispute, including the fundamental issue of whether it

can be brought by Plaintiff-Appellant in the first place, and thus, English law should govern substantive questions of law.

D. Promotion of Interstate and International Systems of Commerce

Consistent application of the internal-affairs doctrine also serves to make the interstate and international systems of commerce work better. Large corporations, such as those listed on national or regional exchanges, will have shareholders in many state and foreign jurisdictions with shares that are frequently traded. *See CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 90 (1987). The markets that facilitate this national and international participation in ownership of corporations are essential for providing capital, not only for new enterprises, but also for established companies that need to expand their business. "This beneficial free market system depends at its core upon the fact that a corporation—except in the rarest situations—is organized under, and governed by, the law of a single jurisdiction, traditionally the corporate law of the [place] of its incorporation." *Id.* A corporation faced with uncertainty about whether and where it will be subject to derivative litigation may be less likely to operate in certain markets, even if this could increase or optimize shareholder value. Application of the internal-affairs doctrine, thus, serves to promote a well-functioning international marketplace.

Plaintiff-Appellant suggest New York law must govern questions of derivative standing in order to preserve New York's status as the country's

commercial and financial center. But history illustrates that New York has continuously maintained its reputation as the epicenter of commercial and financial business even though New York courts have consistently applied the law of the place of incorporation, per the internal-affairs doctrine, to questions of derivative standing. Plaintiff-Appellant's position would likely have the effect of haling more directors and officers into New York courts to defend derivative actions, which could undercut New York's status as a financial epicenter, as foreign corporations may be less likely to do business in New York if it becomes a haven for derivative litigation against non-U.S. corporations.

* * *

This Court has already determined that the internal-affairs doctrine presumptively applies the substantive law of the place of incorporation in legal disputes involving the internal affairs of a corporation. New York courts have, in turn, consistently determined that a shareholder's standing to bring a derivative action is substantive such that the law of the place of incorporation governs this threshold question, absent rare circumstances. As history has borne out, consistent application of the doctrine to questions of derivative standing allows parties to predict when derivative litigation may be maintained against them, it conforms with the expectations of shareholders and corporate fiduciaries, it allows the jurisdiction with the greatest interest to supply the law to adjudicate the dispute, and it promotes

business by allowing corporations to better manage their litigation risk. These interests would be undermined if shareholders could bring derivative litigation in unexpected forums and when the lawsuit could not otherwise be maintained in the corporation's place of incorporation.

CONCLUSION

For all the foregoing reasons, the Court should affirm the First Department's decision to apply the law of the place of incorporation to the question of whether Plaintiff-Appellant has standing to bring derivative claims in a New York court.

Dated: October 28, 2024
New York, New York

Respectfully submitted,

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NEW YORK STATE COURT OF APPEALS
CERTIFICATE OF COMPLIANCE

Pursuant to 22 NYCRR PART 500.1(j) the foregoing brief was prepared on a computer using 2010 Microsoft Word.

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I, Tyrone Heath, 2179 Washington Avenue, Apt. 19, Bronx, New York 10457, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at the address shown above or at

On October 28, 2024

deponent served the within*:* **MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA TO APPEAR AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS- RESPONDENTS**

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