APL-2024-00017
New York County Clerk's Index No. 651500/2020
Appellate Division–First Department Case Nos. 2022-02491
and 2022-04806

Court of Appeals

of the

State of New York

REBECCA R. HAUSSMANN, TRUSTEE OF KONSTANTIN S. HAUSSMANN TRUST, and JACK E. CATTAN,
Derivatively on behalf of BAYER AG,

Plaintiffs-Appellants,

– against –

WERNER BAUMANN, WERNER WENNING, LIAM CONDON, PAUL ACHLEITNER, OLIVER ZÜHLKE, SIMONE BAGEL-TRAH, NORBERT W. BISCHOFBERGER, ANDRE VAN BROICH, ERTHARIN COUSIN, THOMAS

(*For Continuation of Caption See Inside Cover)*

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

THE U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062

FRIED, FRANK, HARRIS, SHRIVER & JACOBSON LLP
MICHAEL C. KEATS
SCOTT B. LUFTGLASS
ALEXIS R. CASAMASSIMA
One New York Plaza
New York, New York 10004
Tel.: (212) 859-8000
Fax: (212) 859-4000
michael.keats@friedfrank.com

Attorneys for Amicus Curiae
The Chamber of Commerce of the United States of America

CP COUNSEL PRESS
(800) 4-APPEAL • (333795)

ELSNER, JOHANNA HANNEKE FABER, COLLEEN A. GOGGINS, HEIKE HAUSFELD, REINER HOFFMANN, FRANK LÖLLGEN, WOLFGANG PLISCHKE, PETRA REINBOLD-KNAPE, DETLEF RENNINGS, SABINE SCHAAB, MICHAEL SCHMIDT-KIEßLING, OTMAR D. WIESTLER, NORBERT WINKELJOHANN, CLEMENS A.H. BÖRSIG, THOMAS FISCHER, PETRA KRONEN, SUE HODEL RATAJ, THOMAS EBELING, KLAUS STURANY, HEINZ GEORG WEBERS, BAYER CORPORATION, BOFA SECURITIES, INC., BANK OF AMERICA CORPORATION, CREDIT SUISSE GROUP AG, HORST BAIER, ROBERT GUNDLACH and CREDIT SUISSE AG,

Defendants-Respondents,

– and –

CHRISTIAN STRENGER, SULLIVAN & CROMWELL LLP and LINKLATERS LLP,

Defendants.

BAYER AG,

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

FRIED, FRANK, HARRIS, SHRIVER & JACOBSON LLP

By: Michael C. Keats

Michael C. Keats
Scott B. Luftglass
Alexis R. Casamassima
One New York Plaza
New York, New York 10004
(212) 859-8100
Michael.keats@friedfrank.com
Scott.luftglass@friedfrank.com
Alexis.casamassima@friedfrank.com

Attorneys for Proposed Amicus Curiae
The Chamber of Commerce of the United States of America

TO:

BOTTINI & BOTTINI, INC.
Francis A. Bottini, Jr.
Michelle C. Lerach
Albert Y. Chang
7817 Ivanhoe Avenue, Suite 102
La Jolla, California 92037
(858) 914-2001

POWERS & SANTOLA, LLP
Michael J. Hutter
100 Great Oaks Boulevard
Suite 123
Albany, New York 12203
(518) 465-5995

Attorneys for Plaintiffs-Appellants Rebecca R. Haussmann, Trustee of Konstantin S. Haussmann Trust and Jack E. Cattan, Derivatively on behalf of Bayer AG

CAHILL GORDON & REINDEL LLP
Joel Kurtzberg
Herbert S. Washer
Adam S. Mintz
32 Old Slip
New York, New York 10005
(212) 701-3000

Attorneys for Defendants-Respondents Credit Suisse Group AG and Credit Suisse AG

WACHTELL, LIPTON, ROSEN & KATZ
William Savitt
Noah B. Yavitz
Emily R. Barreca
51 West 52nd Street
New York, New York 10019
(212) 403-1000

Attorneys for Defendants-Respondents Werner Baumann, Werner Wenning, Liam Condon, Paul Achleitner, Oliver Zühlke, Simone Bagel-Trah, Norbert W. Bischofberger, Andre Van Broich, Ertharin Cousin, Thomas Elsner, Johanna Hanneke Faber, Colleen A. Goggins, Heike Hausfeld, Reiner Hoffmann, Frank Löllgen, Wolfgang Plischke, Petra Reinbold-Knape, Detlef Rennings, Sabine Schaab, Michael Schmidt-Kießling, Otmar D. Wiestler, Norbert Winkeljohann, Clemens A.H. Börsig, Thomas Fischer, Petra Kronen, Sue Hodel Rataj, Thomas Ebeling, Klaus Sturany, Heinz Georg Webers, Horst Baier, Robert Gundlach, Bayer Corporation and Nominal Defendant-Respondent Bayer AG

DAVIS POLK & WARDELL LLP
Lara Samet Buchwald
Chui-Lai Cheung
450 Lexington Avenue
New York, New York 10017
(212) 450-4000

Attorneys for Defendants-Respondents BofA Securities, Inc. and Bank of America Corporation

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

REBECCA R. HAUSSMANN, Trustee of Konstantin S. Haussmann Trust, and JACK E. CATTAN, derivatively on behalf of BAYER AG, *Plaintiffs-Appellants*, - against - WERNER BAUMANN, *et al.*, *Defendants-Respondents*, CHRISTIAN STRENGER, SULLIVAN & CROMWELL LLP, and LINKLATERS LLP, *Defendants,* - and - BAYER AG, *Nominal Defendant-Respondent.*	APL-2024-00017 Appellate Division, First Department Case Nos. 2022-02491, 2022-04806 New York County Clerk's Index No. 651500/20

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 Judiciary. 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

APL-2024-00017
New York County Clerk's Index No. 651500/2020
Appellate Division–First Department Case Nos. 2022-02491
and 2022-04806

Court of Appeals

of the

State of New York

REBECCA R. HAUSSMANN, TRUSTEE OF KONSTANTIN S. HAUSSMANN TRUST, and JACK E. CATTAN,
Derivatively on behalf of BAYER AG,

Plaintiffs-Appellants,

– against –

WERNER BAUMANN, WERNER WENNING, LIAM CONDON, PAUL ACHLEITNER, OLIVER ZÜHLKE, SIMONE BAGEL-TRAH, NORBERT W. BISCHOFBERGER, ANDRE VAN BROICH, ERTHARIN COUSIN, THOMAS

(*For Continuation of Caption See Inside Cover)*

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

THE U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062

FRIED, FRANK, HARRIS, SHRIVER & JACOBSON LLP
MICHAEL C. KEATS
SCOTT B. LUFTGLASS
ALEXIS R. CASAMASSIMA
One New York Plaza
New York, New York 10004
Tel.: (212) 859-8000
Fax: (212) 859-4000
michael.keats@friedfrank.com

Attorneys for Amicus Curiae
The Chamber of Commerce of the United States of America

CP COUNSEL PRESS (800) 4-APPEAL • (333795)

ELSNER, JOHANNA HANNEKE FABER, COLLEEN A. GOGGINS, HEIKE HAUSFELD, REINER HOFFMANN, FRANK LÖLLGEN, WOLFGANG PLISCHKE, PETRA REINBOLD-KNAPE, DETLEF RENNINGS, SABINE SCHAAB, MICHAEL SCHMIDT-KIEßLING, OTMAR D. WIESTLER, NORBERT WINKELJOHANN, CLEMENS A.H. BÖRSIG, THOMAS FISCHER, PETRA KRONEN, SUE HODEL RATAJ, THOMAS EBELING, KLAUS STURANY, HEINZ GEORG WEBERS, BAYER CORPORATION, BOFA SECURITIES, INC., BANK OF AMERICA CORPORATION, CREDIT SUISSE GROUP AG, HORST BAIER, ROBERT GUNDLACH and CREDIT SUISSE AG,

Defendants-Respondents,

– and –

CHRISTIAN STRENGER, SULLIVAN & CROMWELL LLP and LINKLATERS LLP,

Defendants.

BAYER AG,

Nominal Defendant-Respondent.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 500.1(f) of the Rules of Practice of the Court of Appeals of the State of New York, The 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.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

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 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 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 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—is purely a question of *procedural* law to which the internal-affairs doctrine does not apply so that New York's law of derivative standing 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 acknowledged this as recently as May 2024 when, in *Eccles v. Shamrock Capital Advisors, LLC*, it noted that its general 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] Plaintiffs-Appellants would have this Court ignore this decades-long precedent and instead permit a New York court to apply New York derivative-standing law to a company incorporated in Germany in which ***none*** of the conduct at issue occurred in New York, ***no issue*** in the lawsuit is governed by New York law, and ***none*** of the corporate governance policies the lawsuit seeks to challenge involve New York companies—simply because a shareholder-plaintiff chose to file suit in 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.

In this derivative action, certain shareholders of Nominal Defendant-Respondent Bayer AG ("Bayer"), organized under the German Stock Corporation

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

Act and headquartered in Leverkusen, Germany, seek to hold directors and officers of Bayer—***none*** of whom live in New York, personally transacted business in New York, or met with anyone in New York—liable for alleged breaches of fiduciary duties under German law related to Bayer's 2018 acquisition of The Monsanto Company.

The threshold question addressed by the lower courts in this case was whether Plaintiffs-Appellants could establish derivative standing, *i.e.*, their legal entitlement to sue Bayer's Board of Directors on behalf of Bayer itself.

Plaintiffs-Appellants argued that Section 1319 ("Section 1319") of the Business Corporation Law ("BCL") mandates the application of New York law to resolve the question of whether Plaintiffs-Appellants have standing to pursue breach of fiduciary duty claims on Bayer's behalf. BCL § 1319. Plaintiffs-Appellants argued below that they meet the derivative-standing requirements under New York law and thus, their lawsuit should proceed. Defendants-Respondents, on the other hand, argued that the internal-affairs doctrine directs the court to apply the substantive law of the place of incorporation (*i.e.*, Germany) to determine whether the requirements for derivative standing are satisfied.

The New York County Commercial Division of the New York State Supreme Court (the "Commercial Division") held that German law applied and Plaintiffs-Appellants could not satisfy the derivative-standing requirements of German law.

Relying on the longstanding internal-affairs doctrine, the Commercial Division reasoned that claims concerning the relationship between corporations, their directors, and their shareholders are governed by the substantive law of the state or country of incorporation, and that the question of derivative standing was a substantive question of German corporate law. The Commercial Division determined that under German law, Plaintiffs-Appellants did not satisfy the requirements for standing to pursue a derivative action and as such, the case was dismissed. (R.40-41, R.46-47). The First Department of the Appellate Division affirmed this holding. (R.2567-70).

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.

Plaintiffs-Appellants here have 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 Plaintiffs-Appellants' 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 foreign companies and legal challenges focused on conduct that occurred 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, 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 conduct occurring in whole or in part outside of New York, 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 routinely rely 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] the 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* (R.2569) (collecting cases).

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 provisions governing derivative standing to be "substantive" in nature such that under the internal-affairs doctrine, the law of the company's place of incorporation governs. *See, e.g.*, *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); *City of Phila. Bd. of Pensions & Retir. v. Winters*, 2022 N.Y. Slip Op. 34589(U), at *9-11 (Sup. Ct. Nassau Cnty. Feb. 2, 2022); *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.[3] *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 determined that a provision of the Cayman Islands Grand Court Rules, which requires a derivative plaintiff to petition the Cayman Grand Court for leave to continue the action, was procedural (and not substantive), because, among other reasons, it applied to "any

[3] 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).

derivative action commenced in the Cayman Islands, brought by writ on behalf of any corporation, *no matter where incorporated*." 30 N.Y.3d at 254, 256-57. This Court reasoned that where a rule applies to all derivative litigants, regardless of where a corporation was incorporated, the rule is procedural because it governs the specific practice and procedure in the foreign court. *See id.* at 256-57 (noting that the Cayman Grand Court rule in question required certain procedures, *e.g.*, commencement by writ, which could not even be achieved in New York, because for example, a case cannot be commenced by writ in New York). In contrast, a rule is substantive when it requires permission from a foreign court to pursue derivative claims only on behalf of companies incorporated in that jurisdiction. *See id.* Since *Davis*, courts have followed this framework. *See, e.g.*, *Mason-Mahon v. Flint*, 166 A.D.3d 754, 756-57 (2d Dep't 2018) (judicial permission rule in Section 261(1) of United Kingdom Company Act determined to be procedural, because, among other reasons, it "applies only to derivative claims brought in England and Wales, or Northern Ireland, and does not suggest that it applies in any other jurisdiction. . . ."); *City of Aventura Police Officers' Ret. Fund v. Arison*, 70 Misc. 3d 234, 243-45 (Sup. Ct. N.Y. Cnty. 2020) (membership requirement in Section 260 of the United Kingdom Company Act requiring derivative plaintiffs to establish registered ownership of equity on the corporation to establish derivative standing was substantive).

Under the framework set forth in *Davis*, the derivative-standing requirements outlined in the German Stock Corporation Act are substantive. This German law requires that the "regional court in whose judicial district the company has its registered seat shall decide" whether a shareholder has permission to sue derivatively, and it applies to German corporations only because only German companies have a "registered seat" within Germany. (R.844 § 148(2); R.806-07 ¶¶ 68-69). Therefore, even under *Davis*, and in accordance with the internal-affairs doctrine, the applicable derivative-standing requirements under German law are substantive and should apply for purposes of determining whether Plaintiffs-Appellants meet the requisite standing requirements.

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.

Plaintiffs-Appellants offer no compelling alternative option that adequately promotes predictability and uniformity. Plaintiffs-Appellants 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 Plaintiffs-Appellants' 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 Plaintiffs-Appellants do not meet the derivative-standing requirements under German law, and so Plaintiffs-Appellants are instead trying to establish derivative standing under New York law, although it is still an outstanding question whether they could even meet these requirements. (R.26-27). 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 Plaintiffs-Appellants' 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. Corporate charters often state that, in the event of any

doubt, 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, Plaintiffs-Appellants

were on notice long before the institution of this lawsuit that should circumstances arise where they wish to pursue derivative claims against Bayer in a New York court, they would likely need to meet the requirements of derivative standing under German law. Not only is Bayer incorporated in Germany, but Bayer's corporate charter provides that any legal dispute between shareholders and the corporation must be litigated in Germany. (R.315 ¶ 262).

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.

Plaintiffs-Appellants nevertheless contend 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 Plaintiffs-Appellants at 28-45. But Plaintiffs-Appellants disregard an important aspect of the internal-affairs doctrine.

Plaintiffs-Appellants ignore the pre-existing analysis inherent in the internal-affairs doctrine. The internal-affairs doctrine already takes into consideration Plaintiffs-Appellants' 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 German law. Under the *Eccles* framework, Plaintiffs-Appellants did not plead facts sufficient to show that Bayer has virtually no contact with Germany other than the fact of its incorporation. Nor do the factual allegations establish that New York has the dominant interest. As the Commercial Division aptly put it,

> That Bayer engaged New York-based attorneys and arranged funding through New York institutions simply does not constitute purposeful availment as it relates to the cause of action, which relates to due diligence activities as to a Missouri-based company and the decisions made in Germany to proceed with the acquisition forming the basis of this lawsuit. It is simply too tenuous of a connection to New York.

(R.25-26). Consistent with the presumption embedded in the internal-affairs doctrine, Germany 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 Plaintiffs-Appellants in the first place.

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.

Plaintiffs-Appellants suggest that 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. Plaintiffs-Appellants' 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 held 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 Plaintiffs-Appellants have standing to bring derivative claims in a New York court.

Dated: October 28, 2024
New York, New York

Respectfully submitted,

FRIED, FRANK, HARRIS,
SHRIVER & JACOBSON LLP

By: 

Michael C. Keats
Scott B. Luftglass
Alexis R. Casamassima
One New York Plaza
New York, New York 10004
(212) 859-8100
Michael.keats@friedfrank.com
Scott.luftglass@friedfrank.com
Alexis.casamassima@friedfrank.com

Attorneys for Amicus Curiae
Chamber of Commerce of the United States of America

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.

Type. A proportionally spaced typeface was used, as follows:

Name of typeface: Times New Roman
Point size: 14
Line spacing: Double

Word Count. The total number of words in this brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service, certificate of compliance, corporate disclosure statement, questions presented, statement of related cases, or any authorized addendum containing statutes, rules, regulations, etc., is 5,765 words.

STATE OF NEW YORK)		**AFFIDAVIT OF SERVICE**
)	ss.:	**BY OVERNIGHT FEDERAL**
COUNTY OF NEW YORK)		**EXPRESS NEXT DAY AIR**

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**

upon:

BOTTINI & BOTTINI, INC.
Francis A. Bottini, Jr.
Michelle C. Lerach
Albert Y. Chang
7817 Ivanhoe Avenue, Suite 102
La Jolla, California 92037
(858) 914-2001

POWERS & SANTOLA, LLP
Michael J. Hutter
100 Great Oaks Boulevard
Suite 123
Albany, New York 12203
(518) 465-5995

Attorneys for Plaintiffs-Appellants Rebecca R. Haussmann, Trustee of Konstantin S. Haussmann Trust and Jack E. Cattan, Derivatively on behalf of Bayer AG

WACHTELL, LIPTON, ROSEN & KATZ
William Savitt
Noah B. Yavitz
Emily R. Barreca
51 West 52nd Street
New York, New York 10019
(212) 403-1000

Attorneys for Defendants-Respondents Werner Baumann, Werner Wenning, Liam Condon, Paul Achleitner, Oliver Zühlke, Simone Bagel-Trah, Norbert W. Bischofberger, Andre Van Broich, Ertharin Cousin, Thomas Elsner, Johanna Hanneke Faber, Colleen A. Goggins, Heike Hausfeld, Reiner Hoffmann, Frank Löllgen, Wolfgang Plischke, Petra Reinbold-Knape, Detlef Rennings, Sabine Schaab, Michael Schmidt-Kießling, Otmar D. Wiestler, Norbert Winkeljohann, Clemens A.H. Börsig, Thomas Fischer, Petra Kronen, Sue Hodel Rataj, Thomas Ebeling, Klaus Sturany, Heinz Georg Webers, Horst Baier, Robert Gundlach, Bayer Corporation and Nominal Defendant-Respondent Bayer AG

CAHILL GORDON & REINDEL LLP
Joel Kurtzberg
Herbert S. Washer
Adam S. Mintz
32 Old Slip
New York, New York 10005
(212) 701-3000

Attorneys for Defendants-Respondents Credit Suisse Group AG and Credit Suisse AG

DAVIS POLK & WARDELL LLP
Lara Samet Buchwald
Chui-Lai Cheung
450 Lexington Avenue
New York, New York 10017
(212) 450-4000

Attorneys for Defendants-Respondents BofA Securities, Inc. and Bank of America Corporation

the address(es) designated by said attorney(s) for that purpose by depositing **1** true copy(ies) of same, enclosed in a properly addressed wrapper in an Overnight Next Day Air Federal Express Official Depository, under the exclusive custody and care of Federal Express, within the State of New York.

Sworn to before me on 28th day of October 2024

MARIANNA BUFFOLINO
Notary Public State of New York
No. 01BU6285846
Qualified in Nassau County
Commission Expires July 15, 2025

Job# 333795