APL 2023-00087
New York County Clerk's Index No. 651223/20
Appellate Division–First Department Case No. 2022-00866

Court of Appeals

of the

State of New York

NIGEL JOHN ECCLES, LESLEY JAYNE ROSS ECCLES, THOMAS GORDON GRIFFITHS, ROBAT JONES, CHRIS STAFFORD, ASHEK AHMED, ANDREW ALLAN, ALEXANDRA AMOS as personal representative of the Estate of JAY AMOS, JEANNICE ANGELA, KEN BERMAN, ALEX BIRD, DUNCAN BLAIR, CAMERON BOAL, EHI BORHA, JESSE BOSKOFF, GEOFF BOUGH, MICHAEL BRANCHINI, DANIEL BROWN, KELLI BUCHAN, CHARLENE BURNS, WILLIAM CARROLL, DAVE CAVINO, SHREE CHOWKWALE, CORAL HOUSE SERVICES LIMITED, CHRIS CORBELLINI, JIM CROFT, CYRUS DAVID, DAVIDSON FAMILY REVOCABLE TRUST, JAMES DOIG, RYAN DONER, KEVIN DORREN, PAYOM DOUSTI, CARL EKMAN, RYAN FABER, JASON FARIA, VICTORIA FARQUHAR, RORY FITZPATRICK, ADRIANA ESTRADA GENAO, MITCHELL GILLESPIE, ALAN GOLDSHER, WILL GREEN, MELANIE GRIER, JUSTIN HANKE, RYAN HANSEN, PETER HENDERSON, MATTHEW HEVIA, ANDREW HEYWOOD, STEVEN HOLMES, JUSTIN M. HUME, GREG HUMPHREYS, F RESIDUAL LLC, TIM JACKSON, CORY JEZ, THANYALUK JIRAPECH-UMPAI, DEVASHISH KANDPAL, MICHAEL KANE, ALAN KARAMEHMEDOVIC,

(For Continuation of Caption See Inside Cover)

MOTION OF SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION TO APPEAR AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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Plaintiffs-Appellants,

– against –

SHAMROCK CAPITAL ADVISORS, LLC, SHAMROCK CAPITAL GROWTH FUND III, LP, SHAMROCK FANDUEL CO-INVEST LLC, SHAMROCK FANDUEL CO-INVEST II, LP, KKR & CO., INC., FAN INVESTOR LIMITED, FAN INVESTORS L.P., MICHAEL LASALLE, EDWARD OBERWAGER, ANDREW CLELAND, MATTHEW KING, CARL VOGEL, DAVID NATHANSON, FASTBALL HOLDINGS LLC, FASTBALL PARENT 1 INC., FASTBALL PARENT 2 INC., PANDACO, INC., FANDUEL INC. and FANDUEL GROUP, INC.,

Defendants-Respondents.

PLEASE TAKE NOTICE that, upon the annexed affirmation of Anitha Reddy, dated March 1, 2024, and the accompanying proposed brief, the Securities Industry and Financial Markets Association ("SIFMA") will move this Court on March 11, 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 SIFMA leave to file the accompanying brief as *amicus curiae* in support of Respondents in the above-captioned action, and for such other and further relief as the Court may deem just and proper.

Dated: March 1, 2024
New York, New York

Respectfully submitted,

WACHTELL, LIPTON, ROSEN & KATZ

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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 Securities Industry and Financial Markets Association ("SIFMA") certifies that it has no parent corporation, subsidiaries, or affiliates.

STATE OF NEW YORK
COURT OF APPEALS

ECCLES *et al*., *Plaintiffs-Appellants*, v. SHAMROCK CAPITAL ADVISORS, LLC, *et al.* *Defendants-Respondents*.	APL-2023-00087 Appellate Division Docket No. 2022-00866 New York County Clerk's Index No. 651223/20

AFFIRMATION OF ANITHA REDDY IN SUPPORT OF SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION'S MOTION TO APPEAR AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

ANITHA REDDY, an attorney admitted to practice in the courts of the State of New York, and not a party to this action, hereby affirms the following to be true under the penalties of perjury pursuant to CPLR § 2106:

1. I am a partner with the law firm of Wachtell, Lipton, Rosen & Katz, attorneys for *amicus curiae* Securities Industry and Financial Markets Association ("SIFMA") in the above-captioned action. I respectfully submit this affirmation in support of SIFMA's motion to appear as *amicus curiae* in support of Respondents in the above-captioned action. A copy of SIFMA's proposed brief is attached hereto as Exhibit A.

2. SIFMA is the leading trade association for broker-dealers, investment banks, and asset managers operating in the U.S. and global capital markets. On behalf of the industry's one million employees, SIFMA advocates on legislation, regulation, and business policy affecting retail and institutional investors, equity and fixed income markets, and related products and services. SIFMA serves as an industry coordinating body to promote fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. SIFMA also provides a forum for industry policy and professional development. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association ("GFMA").

3. *Amicus curiae*, whose members include many multistate or international corporations, has a strong interest in this case. The internal affairs doctrine has long been understood to impose a strong presumption in favor of applying the law of the state of incorporation to intra-corporate disputes. The consistent enforcement of the internal affairs doctrine serves the interests of corporations and their internal constituencies—shareholders, directors, and officers—by ensuring that disputes concerning corporate governance are ordinarily resolved under a single, easily identifiable law of which internal constituencies are on notice before associating themselves with the corporation.

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

5. 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 this brief or otherwise participated in the 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.

Dated: March 1, 2024
New York, New York

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Exhibit A

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BRIEF FOR *AMICUS CURIAE* SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*

The Securities Industry and Financial Markets Association ("SIFMA") is the leading trade association for broker-dealers, investment banks, and asset managers operating in the U.S. and global capital markets. On behalf of the industry's one million employees, SIFMA advocates on legislation, regulation, and business policy affecting retail and institutional investors, equity and fixed income markets, and related products and services. SIFMA serves as an industry coordinating body to promote fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. SIFMA also provides a forum for industry policy and professional development. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association ("GFMA").

Amicus curiae, whose members include many multistate or international corporations, has a strong interest in this case. The internal affairs doctrine has long been understood to impose a strong presumption in favor of applying the law of the state of incorporation to intra-corporate disputes. The consistent enforcement of the internal affairs doctrine serves the interests of corporations and their internal constituencies—shareholders, directors, and officers—by ensuring that disputes concerning corporate governance are ordinarily resolved under a single, easily

identifiable law of which internal constituencies are on notice before associating themselves with the corporation.

QUESTION PRESENTED

Whether the internal affairs doctrine, the principle that the law of the place of incorporation presumptively governs actions concerning matters specific to relationships among or between a corporation's shareholders, directors, and officers, is correctly applied to an action brought by shareholders asserting breach of fiduciary duty claims against the directors of the corporation.

PRELIMINARY STATEMENT

FanDuel was founded by several of the plaintiffs in this action in Scotland in 2007 as a fantasy sports company organized under the U.K. Companies Act 2006. The company moved its headquarters to New York in 2011, but it continued to maintain multiple offices in Scotland and conducted business across the United States. In 2018, FanDuel's board of directors approved the sale and merger of the company. FanDuel shareholders, including its founders, sued the directors in Supreme Court, claiming that they had breached their fiduciary duties to common shareholders by approving the transaction.

In the decision below, the First Department invoked the internal affairs doctrine in ruling that Scots law, as the law of the state of FanDuel's incorporation, applied to plaintiffs' claims against FanDuel's directors. Under the internal affairs doctrine—a choice-of-law principle long recognized by this Court, the U.S. Supreme Court, and courts across the country—the law of the state of incorporation presumptively governs disputes involving a corporation's internal affairs, including disputes between shareholders and directors.

Plaintiffs contend that the First Department erred by automatically applying the law of the state of incorporation to their claims, without considering New York's interests in applying its law. But the internal affairs doctrine's heavy presumption in favor of the law of the state of incorporation already reflects that analysis. The

doctrine reflects the conclusion that the various interests and policy considerations relevant to the choice-of-law inquiry generally weigh strongly in favor of applying the law of the state of incorporation to intra-corporate disputes, such that applying a different law would be justified only in highly unusual circumstances.

Plaintiffs fail to show that this is the unusual case in which New York has an overriding interest in applying its own law to shareholder claims against directors of a foreign corporation. Nor are plaintiffs' policy arguments for effectively relaxing the presumption of the internal affairs doctrine persuasive. Application of New York law to claims involving the internal affairs of foreign corporations is unnecessary to protect shareholders from their own voluntary investment decisions. If shareholders are dissatisfied with a particular state's corporate governance legal regime, they can simply choose not to invest in corporations chartered under that state's law. Inconsistent application of the internal affairs doctrine would have the practical effect of reducing, not increasing, investor choice in corporate governance legal regimes. It would also create uncertainty regarding the corporate governance law applicable to the many multistate and international companies headquartered in New York but incorporated elsewhere.

ARGUMENT

I. THE INTERNAL AFFAIRS DOCTRINE IS PROPERLY APPLIED TO DETERMINE THE LAW GOVERNING CLAIMS BY SHAREHOLDERS AGAINST DIRECTORS FOR BREACH OF THEIR DUTIES

The internal affairs doctrine is a choice-of-law rule that presumptively applies the law of the state of incorporation to intra-corporate disputes implicating "such 'internal affairs' as the relationship between shareholders and directors." *Zion* v. *Kurtz*, 50 N.Y.2d 92, 100 (1980); *see also Edgar* v. *MITE Corp.*, 457 U.S. 624, 645 (1982) (same). Breach of fiduciary duty claims brought by shareholders against a corporation's directors—the claims that plaintiffs assert in this action—are thus a quintessential example of the sort of intra-corporate dispute to which the internal affairs doctrine applies.

Plaintiffs fault the First Department for invoking the internal affairs doctrine to "automatically" apply Scots law to their claims without conducting an interest analysis to determine the appropriate choice of law. *See* Pls.' Br. 3, 35-36. Plaintiffs misunderstand the internal affairs doctrine. That doctrine reflects a specific application of interest analysis in the context of intra-corporate disputes. In applying the internal affairs doctrine, the First Department thus did not improperly eschew an interest analysis. To the contrary, the First Department correctly determined that this was not the rare intra-corporate dispute in which the relevant interests justified

applying a law other than that of the place of incorporation, and plaintiffs fail to show otherwise.

A. The internal affairs doctrine is a specialized application of interest analysis in the context of intra-corporate disputes

As the First Department recognized, "under the so-called internal affairs doctrine, relationships between a company and its directors and shareholders are generally governed by the substantive law of the jurisdiction of incorporation." R.2241. The First Department's description of the doctrine as "generally"—but not invariably—calling for the application of the law of the state of incorporation confirms that it did not misconstrue the doctrine as requiring the "automatic" application of that law. Indeed, the U.S. Supreme Court has used similar language to describe the doctrine: "As a general matter, the law of the state of incorporation normally determines issues relating to the *internal* affairs of a corporation." *First Nat'l City Bank* v. *Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 621 (1983); *see also Resol. Trust Corp.* v. *Chapman*, 29 F.3d 1120, 1122 (7th Cir. 1994) ("When the subject is liability of officers and directors for their stewardship of the corporation, the law presumptively applicable is the law of the place of incorporation.").

Plaintiffs contend that the First Department fundamentally erred by invoking the internal affairs doctrine to apply Scots law to their claims without conducting the interest analysis New York requires to determine the choice of law. *See* Pls.' Br. 3,

5, 22. But the internal affairs doctrine supplies a robust presumption in favor of the law of the place of incorporation precisely because it is a "species of interest analysis." *Hau Yin To* v. *HSBC Holdings, PLC*, 700 Fed. App'x 66, 68-69 (2d Cir. 2017). Under the interest analysis employed by New York courts, like those of many other states, "the law of the jurisdiction having the greatest interest in resolving the particular issue" applies. *Cooney* v. *Osgood Mach., Inc.*, 81 N.Y.2d 66, 72 (1993). The internal affairs doctrine reflects the insight that weighing the various interests relevant to determining the proper choice of law for intra-corporate disputes will—almost always—yield the conclusion that the law of the state of incorporation should apply.

The Restatement (Second) of Conflict of Laws makes this clear. Section 6 of the Restatement, titled "Choice-of-Law Principles," identifies factors relevant to determining "the state of the most significant relationship" to a controversy, and thus to determining the applicable law. Restatement (Second) of Conflict of Laws § 6 cmt. c (1971). Those factors are:

> (a) the needs of the interstate and international systems,
> (b) the relevant policies of the forum,
> (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
> (d) the protection of justified expectations,
> (e) the basic policies underlying the particular field of law,
> (f) certainty, predictability and uniformity of result, and

(g) ease in the determination and application of the law to be applied.

Id. § 6.

Section 302 of the Restatement addresses the choice-of-law inquiry for matters specifically "involv[ing] the 'internal affairs' of a corporation—that is the relations inter se of the corporation, its shareholders, directors, officers, or agents." *Id.* § 302 cmt. a. Section 302(1) states that issues involving such matters "are determined by the local law of the state which, with respect to the particular issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6"—the factors listed above. *Id.* § 302. Section 302(2) then goes on to explain that the state that has the most significant relationship to an internal affairs dispute under the principles identified in § 6 will usually be the state of incorporation: "The local law of the state of incorporation will be applied to determine such issues, *except in the unusual case* where, with respect to the particular issue, some other state has a more significant relationship to the occurrence and the parties . . . ." *Id.* (emphasis added).

The Restatement explains why consideration of the factors in § 6 will usually lead to the conclusion that the law of the state of incorporation should be applied to resolve an intra-corporate dispute. Application of that law "will usually be supported by those choice-of-law factors favoring the needs of interstate and international systems, certainty, predictability and uniformity of result, protection of

the justified expectations of the parties and ease in the application of the law to be applied," as well as "the factor looking toward implementation of the relevant policies of the state with the dominant interest." *Id.* § 302 cmt. e. The Restatement thus concludes: "By reason of these factors and of the force of precedent, the local law of the state of incorporation should be applied *except in the extremely rare situation* where a contrary result is required by the overriding interest of another state in having its rule applied." *Id.* § 302 cmt. g (emphasis added).

New York courts have likewise recognized that these factors will almost always support application of the law of the place of incorporation to disputes involving a corporation's internal affairs. In *Zion* v. *Kurtz*, 50 N.Y.2d 92 (1980), this Court held that Delaware law applied to a suit brought by shareholders of a Delaware corporation challenging director action, citing the Restatement's admonition that the law of the place of incorporation should be applied to intra-corporate disputes except in the rarest of cases. *See id.* at 100 (citing Restatement (Second) of Conflict of Laws § 302 cmt. g); *see also Gardner* v. *Major Auto. Cos.*, No. 11-CV-1664, 2014 WL 4660850, at *1 (E.D.N.Y. Sept. 18, 2014) ("[E]very exception [to the internal affairs doctrine] must come at the expense of the uniformity and predictability the doctrine was designed to promote.").

In *Hart* v. *General Motors Corp.*, 129 A.D.2d 179 (1st Dep't 1987), the First Department elaborated on the significance of these factors in reversing Supreme

Court's determination that multiple states' laws, not just Delaware's, could be applied to a shareholder challenge to a transaction by a Delaware corporation:

The needs of interstate and international systems. The *Hart* court explained that "single State resolution of issues of corporate governance," under the law of the state of incorporation, aids interstate and international systems of commerce. *Hart*, 129 A.D.2d at 183. Large corporations "will have shareholders in many States and shares that are traded frequently" and "[t]he markets that facilitate this national and international participation in ownership of corporations are essential for providing capital." *CTS Corp.* v. *Dynamics Corp. of Am.*, 481 U.S. 69, 90 (1987). Accordingly, as the *Hart* court recognized, "[t]his 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 State of its incorporation." *Hart*, 129 A.D.2d at 183 (quoting *CTS*, 481 U.S. at 90).

Certainty, predictability, and uniformity of result. The *Hart* court emphasized that the "[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." *Id.* at 184 (quoting Restatement (Second) of Conflict of Laws § 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)).

Protection of justified expectations and ease of application of law. The *Hart* court explained that applying the law of the state of incorporation also protects the justified expectations of the parties by applying a clearly identified law they had themselves chosen. *Hart*, 129 A.D.2d at 184. As the court explained, "[i]n 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." *Id.* Thus, "[t]he corporation and its shareholders rightfully expect that the laws under which they have chosen to do business will be applied." *Id.* at 185.

Implementation of policies of the state with the dominant interest. The *Hart* court also explained that applying the law of the state of incorporation would "implement[] . . . the relevant policies of the state with the dominant interest." Restatement (Second) of Conflict of Laws § 302 cmt. b. As the court held, "it is Delaware, not New York, which has an interest superior to that of all other states in deciding issues concerning directors' conduct of the internal affairs of corporations chartered under Delaware law." *Id.* at 185.

As the foregoing shows, the internal affairs doctrine is not an exception to the modern choice-of-law inquiry that considers and weighs various interests in

determining the law most appropriate to apply in resolving a dispute. Rather, it reflects the reasoned and widely accepted view that, when the dispute presented involves a corporation's internal affairs, and in particular the liability of directors to shareholders, the relevant interests weigh overwhelmingly in favor of applying the law of the state of incorporation.

B. Plaintiffs fail to show that this case presents the rare intra-corporate dispute that should not be governed by the law of the state of incorporation

In the decision below, the First Department held that Scots law—the law of FanDuel's state of incorporation—governed claims by plaintiffs, as FanDuel shareholders, against the defendants, as FanDuel directors. R.2241. Plaintiffs contend that the First Department "committed reversible error" in so ruling because "it ignored New York's deep interests in this case and instead applied the internal affairs doctrine" without conducting a "balancing-of-the-interests analysis." Pls.' Br. 22-23; *see also id.* at 28.

As shown above, however, the internal affairs doctrine is not a circumvention of a choice-of-law analysis that considers and balances various factors and interests. *See supra* Point I.A. Rather, its presumption in favor of the law of the place of incorporation reflects the weight assigned to important factors that, in the context of an intra-corporate dispute, are served by application of that law. *Id.* Plaintiffs are thus incorrect to assert that, by invoking the internal affairs doctrine, the First

Department considered only the significance of FanDuel's state of incorporation and disregarded other factors relevant to the choice-of-law inquiry. *See* Pls.' Br. 32, 35-36.

Plaintiffs do not dispute that the factors generally considered to favor application of the law of the place of incorporation are properly considered by a court determining the law applicable to an intra-corporate dispute. Nor do plaintiffs dispute that each of those factors properly weigh in favor of applying the law of the state of incorporation here. Indeed, plaintiffs do not dispute that Scotland has a strong interest in the application of its law to determine the liabilities of directors of a corporation chartered under its law.

To contend that New York law should nevertheless apply to this dispute between shareholders and directors of a foreign corporation, plaintiffs principally invoke the Restatement and *Greenspun* v. *Lindley*, 36 N.Y.2d 472 (1975). *See* Pls.' Br. 37-38. But neither authority supports the conclusion that this is the rare intra-corporate dispute that should not be governed by—and only by—the law of the state of incorporation.

Section 309 of the Restatement specifically addresses the choice-of-law inquiry for intra-corporate disputes regarding "the existence and extent of a director's or officer's liability." Restatement (Second) of Conflict of Laws § 309. Like § 302, which generally addresses the choice-of-law inquiry for all such

disputes, § 309 articulates the default rule of the internal affairs doctrine—that the law of the state of incorporation will be applied unless, considering the factors in § 6, another state has a more significant relationship to the dispute. *Id*. § 309. Section 309 expressly incorporates § 302's discussion of the choice-of-law factors that generally supports the application of the law of the state of incorporation. *Id.* § 309 cmt. c. Most importantly, it incorporates § 302's admonition that "[b]y reason of these factors and the force of precedent, the local law of the state of incorporation should be applied except in the extremely rare situation where a contrary result is required by the overriding interest of another state in having its rule applied." *Id.* § 302 cmt. g.

Plaintiffs contend that § 309 supports the application of New York law to their claims seeking to impose liability on FanDuel's directors. Pls.' Br. 38-39; Reply Br. 23-24. But they skip over § 302's affirmation of the presumption in favor of applying the law of the state of incorporation to issues of director liability. They focus instead on the comment in § 309 stating that issues of liability for certain director acts "can practicably be decided differently in different states." Pls.' Br. 38 (quoting Restatement (Second) of Conflict of Laws § 309 cmt. c); *see also* Reply Br. 23. Because their claims challenge such acts by the FanDuel directors, plaintiffs say, the Restatement "requires" the application of New York law to their claims. Pls' Br. 38-39.

Plaintiffs misread § 309, which confirms that Scots law is the proper law to resolve plaintiffs' claims of director liability. Section 309 explains that directors' acts can be divided into "two broad categories": (1) acts, "such as the issuance of stock and the declaration of dividends, which closely affect the organic structure or internal administration of the corporation," and (2) acts that do not, "such as seizing a corporate opportunity or causing the making of a contract or the commission of a tort." Restatement (Second) of Conflicts of Laws § 309 cmt. c. As to the first category, the Restatement explains that "[i]ssues relating to the validity of such acts, *and to any resulting liability on the part of directors and officers*, cannot practicably be determined differently in different states" because "[i]t would be impracticable, for example, for a share issue or declaration of dividends to be valid in one state and invalid in another." *Id.* (emphasis added). But as to the second category, the Restatement explains that "[i]ssues relating to the liability of the directors and officers . . . can practicably be decided differently in different states" because "[i]t would be practicable . . . for a director to be held liable for a given act in one state and to be held not liable for an identical act in another state." *Id.*

Plaintiffs suggest that because it is "practicable" for FanDuel directors to be held monetarily liable for breach of fiduciary duty claims in New York, but not in Scotland, the Restatement supports the application of New York law to plaintiffs' claims. Reply Br. 23-24. But plaintiffs omit the rest of the comment to § 309. The

comment explains that, even where it is "practicable" for different laws to be applied to claims of director liability, "[n]evertheless, in the absence of an applicable local statute, the local law of the state of incorporation has usually been applied to determine the liability of the directors or officers for acts such as these to the corporation, its creditors, and shareholders." Restatement (Second) of Conflict of Laws § 309 cmt. c; *see also In re BP P.L.C. Derivative 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.").

Plaintiffs' own authority confirms the Restatement's observation. Plaintiffs cite dozens of cases in their briefs, but only one in which a court applied New York law to claims for breach of duty against directors of a foreign corporation. *See Stephens* v. *Nat'l Distillers & Chem. Corp.*, 1996 WL 271789 (S.D.N.Y. May 21, 1996) (cited in Pls.' Br. 30; Reply Br. 19). In *Stephens*, however, the court applied New York law, rather than the law of the state of incorporation, because it was required to by "an applicable local statute"—namely, a provision of the New York Insurance Law that subjected foreign insurance companies to the New York Business Corporation Law, including the fiduciary duty standards it codified. *See Stephens*, 1996 WL 271789, at *5 (citing Restatement (Second) of Conflict of Laws

§ 309 cmt. a). Tellingly, plaintiffs do not identify a single instance where, in the absence of a statutory directive, a New York court has applied New York law, rather than the law of the state of incorporation, to shareholder claims of director liability.

Plaintiffs are therefore wrong in asserting § 309 and its comments support the application of New York law to their claims of director liability because those claims can "practicably be decided differently in different states." Plaintiffs compound their error by asserting that a legal regime in which shareholder claims of director liability are "decided differently in different states" is "exactly what *Greenspun* and its progeny seek to achieve." Reply Br. 23-24.

Plaintiffs misread *Greenspun* just as they misread § 309. *Greenspun*, like § 309, recognizes that the law under which a business entity is organized presumptively supplies the law applicable to claims by shareholders asserting liability for mismanagement of the entity. *Greenspun*, 36 N.Y.2d at 477. As the court explained, "prima facie, Massachusetts law is applicable" to shareholder plaintiffs' claims against the trustees of an investment trust because the trust was "organized and existing under the laws of Massachusetts." *Id.* at 476. The court's recognition of Massachusetts law as "prima facie" applicable hardly evinces a project to show that the shareholder plaintiffs' claims could be legitimately subject to both New York and Massachusetts law.

To the contrary, the court's analysis proceeds as one would expect of a court aware of the default law applicable to intra-corporate disputes but equally cognizant of the possibility that any particular case might be one of the rare exceptions to the general rule. Plaintiffs emphasize that the court ultimately applied Massachusetts law only after observing that "this record is barren" of "significant contacts" between the trust and New York "to support a finding of such 'presence' . . . as would, irrespective of other considerations, call for the application of New York law." *Id*.; *see* Pls.' Br. 26-27. But the court's acknowledgment of the theoretical possibility of such a presence is consistent with a recognition of the escape hatch built into the internal affairs doctrine for those cases "when the corporation has little or no contact with" the state of incorporation "other than the fact that it was incorporated there" and "does all, or nearly all, of its business" in another state in which "most of the corporation's shareholders are domiciled." Restatement (Second) of Conflict of Laws § 302 cmt. g. The court's listing of potential contacts between the trust and New York identifies exactly the sort of contacts relevant to determining if the business trust was overwhelmingly connected with New York, with no link to Massachusetts other than its organization under Massachusetts law: "where the business of the trust is transacted, where its principal office is located or its records kept, where the trustees meet, what percentage of the investment portfolio relates to real property situate in New York, what proportion of the shareholders reside in New

York State or of other facts on which a finding of such 'presence' in New York" would be sufficient to justify, "irrespective of other considerations, . . . the application of New York law." *Greenspun*, 36 N.Y.2d at 477.

Plaintiffs transform this list of potential "contacts" between the real estate trust at issue and New York into generally applicable "factors" that *Greenspun* held must be "balanced" in determining the law applicable to any "business tort" involving the internal affairs of a business entity. *See* Pls.' Br. 32-35; Reply Br. 12-13. That supposed holding appears nowhere in *Greenspun*—or any other New York decision. The factors generally relevant to the choice-of-law inquiry are not simply various locational contacts that indicate some "presence" in the forum state. *Greenspun*, 36 N.Y.2d at 477. Rather, they are factors that identify important interests that should be served by the choice-of-law analysis—such as the various interests and policies identified in § 6 of the Restatement, *see supra* Point I.A, and discussed in decisions such as *Hart*. Plaintiffs' invented "balancing" test thus fails to balance the interests that New York's choice-of-law inquiry seeks to advance.

II. PLAINTIFFS' POLICY ARGUMENTS DO NOT JUSTIFY WEAKENING THE STRONG PRESUMPTION OF THE INTERNAL AFFAIRS DOCTRINE IN FAVOR OF APPLYING THE LAW OF THE STATE OF INCORPORATION TO INTRA-CORPORATE DISPUTES

Plaintiffs offer dire predictions of the consequences for New York investors and New York's status as a commercial capital if this Court affirms the decision below. But their various policy arguments in favor of reversal are unpersuasive.

A. Applying New York law to shareholder suits against directors of foreign corporations is unnecessary to protect the interests of shareholders residing in New York

Plaintiffs complain that an affirmance will relegate New York shareholders to claims under foreign law whenever they assert a claim for breach of duty against directors of a foreign corporation even if the alleged breaches "are based entirely on New York conduct that caused injury" to shareholders in New York. Pls.' Br. 3, 37-39; *see also* Brief for *Amici Curiae* Conflict of Laws Professors 22 ("New York's protective interest is at or near its apogee in the context of fiduciary relations."). Plaintiffs' argument takes no account of the fact that a shareholder makes a voluntary decision to invest in a foreign corporation—and that investment necessarily occurs before any claim for breach of fiduciary duty against the directors of the foreign corporation arises. If a shareholder believes that a jurisdiction's remedies for a director's breaches of fiduciary duty are inadequate, the shareholder may choose not to invest in corporations chartered under that jurisdiction's law. Accordingly, New York does not need to apply its own law to shareholder claims against directors of foreign corporations to protect the interests of shareholders in New York. New York shareholders are fully capable of protecting themselves by selecting investments that reflect their preferences for the legal regime governing any claims they may have against the corporation's directors or otherwise involving the corporation's internal affairs.

B. Weakening the strong presumption in favor of applying the law of the state of incorporation to intra-corporate disputes would reduce, not increase, investor choice among corporate governance regimes

Plaintiffs speculate that an affirmance "would promote a proverbial 'race-to-the-bottom' in the corporate governance arena—encouraging corporate actors to incorporate in lawless or unruly jurisdictions (offshore or otherwise) and then disregard their fiduciary obligations when conducting business in New York." Pls.' Br. 4; *see also* Brief for *Amici Curiae* Conflict of Laws Professors 26 (contending that an affirmance would undermine New York's "interest in ensuring it that it does not become either a base or a haven for law breakers" (internal quotation marks omitted)). But in the absence of the rare statutory directive to apply local law, New York courts—and state and federal courts across the country—have for decades consistently applied the law of the state of incorporation to shareholder claims against directors of foreign corporations. *See supra* Point I. If doing so were going to set off a "race to the bottom" culminating in the concentration of corporations chartered in "lawless jurisdictions," the race would be over by now. Yet there is no evidence that most multistate corporations are chartered in "lawless" jurisdictions. For decades, the majority of large U.S. public companies have been incorporated in Delaware. *See* Delaware Division of Corporations, *2022 Annual Report* 1 (reporting that 68.2% of Fortune 500 companies are incorporated in Delaware).

Unsurprisingly, plaintiffs do not contend that Delaware, or for that matter the U.K., where FanDuel is chartered, is a "lawless" jurisdiction.

Plaintiffs fail to recognize that a "race to the bottom" is prevented by market forces—the more "lawless" the jurisdiction of incorporation, the less attractive and the cheaper the investment in the corporation, and thus the more equity the corporation will have to sell to raise the same amount of capital. *See* Vincent S.J. Buccola, *Opportunism and Internal Affairs*, 93 Tul. L. Rev. 339, 364 (2018) ("The conventional race to the bottom story faces market-oriented objections because managers must choose their law before capital contributions are priced."). The internal affairs doctrine is "vital" to the operation of this market check. *See* Frank H. Easterbrook, *The Race for the Bottom in Corporate Governance*, 95 Va. L. Rev. 685, 687-88 (2009).

Furthermore, contrary to plaintiffs' argument, weakening the presumption in favor of applying the law of the state of incorporation to intra-corporate disputes would reduce, not increase, investor choice "in the corporate governance arena." *See* Pls.' Br. 4. Faced with a choice between the law of the state of incorporation and the law of another state, shareholder plaintiffs will naturally seek to bring claims against directors for breach of duty under the law that maximizes the potential value of those claims—generally the law that places relatively greater restrictions on director conduct. *See* Buccola, *supra*, at 360-65 (explaining this dynamic). If the

law of the state of incorporation is not consistently applied to claims against directors, then shares will be sold to shareholders in states with more restrictive corporate governance laws—where the shares (and any claims of director liability they carry) will be more valuable. *Id.* at 362-63. Thus, "[a]bsent the internal affairs doctrine," states with the most restrictive corporate governance laws "will effectively govern stockholder rights and obligations." *Id.* at 363. But when the internal affairs doctrine is consistently enforced, stockholder rights and obligations vary based on the law of the state of incorporation, giving investors a range of corporate governance regimes to which they can choose to subject their capital.

C. New York's attractiveness as a headquarters site for multistate corporations is enhanced by the consistent application of the internal affairs doctrine's strong presumption in favor of the law of the state of incorporation

As the country's financial and commercial capital and one of the world's preeminent centers of economic activity, New York is an attractive headquarters site for multistate and international corporations. Indeed, FanDuel, originally both incorporated and headquartered in Scotland, moved its headquarters to New York several years after its founding. R.461 ¶ 27. Nearly fifty companies in the Fortune 500 are headquartered in New York—but only ten of those companies are incorporated in New York. *See* Deal Point Data, Governance, https://www.dealpointdata.com/rj?vb=Action.cn&pg=sMain&app=corp (last visited February 27, 2024). And many smaller companies incorporated elsewhere

make New York home to their headquarters. Inconsistent application of the internal affairs doctrine by the New York courts would diminish New York's appeal as a headquarters site. Plaintiffs contend that foreign corporations, like FanDuel, that are headquartered in New York, have some shareholders in New York, and do some business in New York should be subject to New York corporate governance law. Pls.' Br. 32-35. Were this Court to adopt their view, many foreign corporations based in New York could no longer assume that their internal affairs are solely regulated by the law of the state of incorporation. All economic actors value certainty, predictability, and uniformity when evaluating the legal regimes to which they may be subject—multistate and international corporations especially so, since they are most at risk of being subject to the potentially conflicting or inconsistent laws of multiple jurisdictions. Consistent application of the internal affairs doctrine allows cross-border companies to do significant business in New York, thus contributing to its economic lifeblood, while abiding by the corporate governance rules of their respective states of incorporation. New York—and the many shareholders, directors, and officers who reside here—has been well served by that flexibility.

CONCLUSION

For the foregoing reasons, this Court should affirm the First Department's decision to apply the law of the state of incorporation to plaintiffs' claims of director liability.

Dated: March 1, 2024
New York, New York

Respectfully submitted,

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WORD COUNT CERTIFICATION

Pursuant to Rule 500.13(c)(1) of the Rules of Practice of the Court of Appeals of the State of New York, I hereby certify that, according to the word count of the word-processing system used to prepare this brief, the total word count for all printed text in the body of the brief exclusive of the material omitted under Rule 500.13(c)(3), is 5,514 words.

Dated: March 1, 2024
New York, New York

By: 
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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 March 1, 2024

Mariana Braylovskiy

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