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COURT OF APPEALS

STATE OF NEW YORK

HAUSSMANN,

Appellant,

-against-

NO. 3

BAUMANN,

Respondent.

20 Eagle Street
Albany, New York
April 10, 2025

Before:

CHIEF JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUSTICE CARL LANDICINO
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE SHIRLEY TROUTMAN
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

Appearances:

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1 CHIEF JUDGE WILSON: Last case on the calendar is
2 Haussmann v. Baumann.

3 MR. BOTTINI: Good afternoon. Frank Bottini for
4 appellants to beg the court's indulgence to hear me again
5 on this case. And again, I'd like to respectfully request
6 five minutes in - - - for rebuttal.

7 CHIEF JUDGE WILSON: Sure.

8 MR. BOTTINI: Your Honors, the first issue is the
9 identical issue. So I don't want to beat a horse to horse
10 to death, but we also have 1319 involved in this case.
11 It's the identical issue. The panel below also relied on
12 the First Department's reverse decision in Davis in
13 reaching its 1319 conclusion. But I don't want to repeat
14 those arguments, so I'll address anything in rebuttal about
15 1319 that my colleague addresses.

16 The next issue that we have in the Bayer case
17 here is an important issue of personal jurisdiction under
18 CPLR 302. The lower courts should be reversed because they
19 ruled that there was no personal jurisdiction, which is
20 subject to a de novo review. And - - -

21 JUDGE RIVERA: Why don't we go to the substantive
22 procedural issue, since that's connected to the BCL issue?
23 Let's do that before you get to the personal jurisdiction,
24 please.

25 MR. BOTTINI: Okay. The substantive procedural

1 issue about Section 148 of the - - -

2 JUDGE RIVERA: German Stock, yes.

3 MR. BOTTINI: - - - German Stock - - - okay.

4 JUDGE RIVERA: This seems like a substantive
5 requirement, no?

6 MR. BOTTINI: No, Your Honor, this is a - - -

7 JUDGE RIVERA: It's not tethered to the German
8 courts.

9 MR. BOTTINI: It is tethered to the German
10 courts. It requires the case to be brought in Leverkusen,
11 which is a Bayer company town located between Cologne and
12 Düsseldorf.

13 JUDGE RIVERA: No. No. But I'm talking about
14 the provision that has a minimum ownership requirement.
15 148(1).

16 MR. BOTTINI: So again, it's - - - that's the
17 same as if you have a requirement saying you have to be a
18 member or a record holder. That's procedural - - -

19 JUDGE RIVERA: Why is that not substantive,
20 granting a right to a particular class of the shareholders?

21 MR. BOTTINI: Because it's the same as it's an
22 arbitrary requirement. And I think, first of all - - -

23 JUDGE RIVERA: Well, it means something to the
24 people who don't have the minimum number of shares that
25 they own, right?

1 MR. BOTTINI: Yes. So first of all, it's a
2 procedural requirement because it's - - - the whole set is
3 contained in the whole section dealing with procedures that
4 only apply if the case is filed in essence, Leverkusen,
5 Germany. So it's - - - if you look at Section 148, which
6 you can find at page 445 of the record, the entire section
7 says court - - - the title of the section is Court
8 Procedure for Petition Seeking Leave to File an Action for
9 Damages.

10 And then the very first subsection, Your Honor,
11 that you're referring to, subsection (1), which says
12 shareholders whose aggregate holdings at the time of filing
13 the petition equal or exceed one percent of the share
14 capital, et cetera, et cetera.

15 JUDGE RIVERA: Uh-huh.

16 MR. BOTTINI: And so it's contained in the
17 section that deals exclusively with court procedures, if
18 and only if the case is filed in Germany. And then it goes
19 on to contain - - -

20 JUDGE RIVERA: But it is recognizing the subclass
21 of shareholders who have to comply with those procedures,
22 right - - - or to whom those procedures apply? I mean,
23 it's difficult for me to get past the point that that - - -
24 it's designating who may proceed. It's recognizing a right
25 for them to proceed.

1 MR. BOTTINI: Yeah. It sets forth a minimum.
2 It's one percent of the shares is the requirement.

3 JUDGE RIVERA: Yes. Right.

4 MR. BOTTINI: And so - - - but, again - - -

5 JUDGE SINGAS: But that's different than what - -
6 - in Davis. I mean, as Judge Rivera is pointing out,
7 creating a right versus just a remedy is - - -
8 distinguishes it. And haven't we said that statutes that
9 do both are more substantive than procedural.

10 MR. BOTTINI: Well, again, I mean, I suppose that
11 someone could look at it that way, but from our
12 perspective, that requirement, again, is contained in a
13 section whose entire import is - - - is geared towards
14 procedures and that the whole title is Court Procedures for
15 Filing an Action in Germany.

16 So in Davis, I don't believe, Your Honor, that
17 it's inconsistent with Davis, because the whole point of
18 Davis, I believe, is that because there was no indication
19 in the section of the Cayman Islands law that these rules -
20 - - procedural rules - - - were intended to apply to cases
21 filed outside the Cayman Islands, that therefore wouldn't
22 be applied in New York. And here, in section 148 of the
23 German Stock Corporation - - -

24 JUDGE RIVERA: What about - - - what about the
25 German law expert's testimony? What about that - - - or

1 their opinion?

2 MR. BOTTINI: Well, yeah, we submitted an
3 affidavit of Professor Mankowski, who's a German law expert
4 out of Hamburg, Germany. And our German law expert said
5 that this provision was not intended to have any
6 applicability outside of Germany and that New York laws
7 would apply. And also, fundamentally, our position, Your
8 Honor, is if you interpret this Section 148 of the German
9 Stock Corporation Act the way the respondents would have
10 you, it's setting up a situation where you say Germany can
11 divest this court - - - or the New York courts of
12 jurisdiction - - - and New York law holds to the contrary
13 that - - - there was a famous case from Texas that we cited
14 where - - -

15 JUDGE RIVERA: But I thought - - - I'm just going
16 to - - - for one moment - - - I thought - - - I know you're
17 not arguing it here. You said you'd do it in rebuttal.
18 That's fine. But it seems to me in the prior case, you
19 were - - - I thought you were, in part, arguing that the
20 BCL requirement in that case that allowed that particular
21 class of shareholders to proceed with substantive. Did I
22 misunderstand? Because I can't see if that's substantive
23 for purposes of your BCL argument, this wouldn't be
24 substantive.

25 MR. BOTTINI: Are you referring to the provision



1 of the 80 - - -

2 JUDGE RIVERA: Beneficial owners.

3 MR. BOTTINI: Of 626?

4 JUDGE RIVERA: Yeah.

5 MR. BOTTINI: No, that's a - - - Davis said that
6 that was a procedural requirement. Those are New York's
7 gatekeeping rules regarding derivative cases, Section 626.
8 So that's a - - - that's a derivative of - - - I'm sorry -
9 - - a procedural - - -

10 JUDGE RIVERA: Uh-huh.

11 MR. BOTTINI: - - - statute.

12 JUDGE RIVERA: I misunderstood you then.

13 MR. BOTTINI: Yeah. The - - -

14 JUDGE RIVERA: I thought you had argued it was
15 substantive. My apologies.

16 MR. BOTTINI: Right. I mean, look, some state -
17 - - like Delaware thinks its statute is substantive, but
18 that's - - - you know, Delaware says that because they want
19 everybody to have to apply their statute. New York says
20 626 is procedural. I think if you look at it fairly, it's
21 a procedural statute. What you have to allege - - - you
22 have to wear a, you know, yellow hat to come to the court
23 on Tuesday to present your petition. I mean, it's all
24 arbitrary. But look, New York legislature - - -

25 JUDGE RIVERA: Well, it's - - - the one percent

1 ownership is not arbitrary like a yellow hat.

2 MR. BOTTINI: Okay.

3 JUDGE RIVERA: It is trying to say you have a
4 particular stake and they don't want - - - right - - -
5 someone who's just got de minimis interest to be able to
6 come in and raid or do something else, right?

7 MR. BOTTINI: Right. But again, Germany, when
8 they enacted it, did not say that it would - - - this
9 provision would apply to any derivative case filed outside
10 of Germany, and they did not say that they were purporting
11 to restrict the ability of anyone to file outside - - - our
12 German law expert said that this statute is not intended to
13 prevent - - -

14 JUDGE CANNATARO: But under the internal affairs
15 doctrine, they don't have to say that, do they? That's
16 what the internal affairs doctrine does. It applies a sort
17 of presumption that the laws of the home country are going
18 to apply in whatever form. The only thing we're debating
19 here is how expansive is that command. But this thing
20 about not saying anything doesn't seem to change the
21 analysis.

22 MR. BOTTINI: Okay. But the - - - but in Davis
23 and the other cases we looked at, the analysis is, does the
24 statute pertain only to cases to be filed in that
25 jurisdiction? And that's why I say, in the act, if they

1 don't say that the act was intended to apply outside of
2 Germany, and pursuant to this court's holding in Davis, it
3 doesn't apply to cases filed in New York. You apply 626.
4 And 626 doesn't say you have to own one percent, and I
5 think that's the analysis.

6 Again, we go back to 1319, the procedural versus
7 substantive test was not the test that the New York
8 legislature adopted when it passed 1319, because 1319
9 contains substantive provisions. The first subsection of
10 1319 is (a)(1), which is a dissenters' rights statute. I
11 mean, that's a very substantive provision. When does a
12 shareholder have the right to seek dissenter's rights when
13 there's a merger? And in 1319(a)(1), the New York
14 Legislature gave that substantive right to shareholders of
15 - - - in foreign corporations as long as the foreign
16 corporation was doing business in New York. So - - -

17 JUDGE CANNATARO: Let me just go back to my old
18 cook's saw about the demand requirement. So if the German
19 Stock Corporation Act has a demand requirement and 626 has
20 a demand requirement, whose requirement are we following
21 for an action brought in New York?

22 MR. BOTTINI: We're following New York's - - -

23 JUDGE CANNATARO: Does it - - -

24 MR. BOTTINI: - - - because it's part of 626, and
25 1319 says 626 applies.

1 JUDGE CANNATARO: And it's not substantive, it's
2 procedural - - -

3 MR. BOTTINI: It doesn't matter if it's
4 substantive or procedural because 1319 didn't pick the
5 items to be applied based on whether they were substantive
6 or procedural, it picked them because the New York
7 Legislature made very significant policy decisions
8 governing when they thought New York law should apply. And
9 they picked some procedural, like 626, I would argue, and
10 some substantive like the dissenters' rights statute. And
11 also, if you look at 1317, they said 719 and 720 of the
12 BCL, should apply. Those are substantive provisions. So
13 they just picked some New York provisions.

14 And again, it's not inconsistent with the
15 internal affairs doctrine. It's just - - - reflects the
16 fact that they didn't decide to adopt - - - embrace it in
17 its entirety. They said we want some New York law to
18 apply. And it's fair because these companies - - - foreign
19 companies, are choosing voluntarily to do business in New
20 York. And you have to satisfy 302 for the personal
21 jurisdiction. And that's - - - they made these policy
22 decisions. And people may not like them. They may
23 disagree with them, but it's not up to us to refuse to
24 follow them, which is what respondents want. They say
25 disregard - - - and by the way, if there's a conflict

1 between the common law, which is all the internal affairs
2 doctrine is - - - if there's a conflict between the common
3 law and statute, the statute prevails. That's New York
4 law. I don't think there's a conflict. But if there were
5 a conflict, if you decide there's a conflict, you must
6 apply the statute. That's New York law.

7 CHIEF JUDGE WILSON: You wouldn't want it to go
8 to personal jurisdiction. And at some point, I'd like to
9 hear you on for na - - - forum non also, so - - -

10 MR. BOTTINI: Thank you, Your Honor. We're
11 getting sidetracked there. Yeah. So under 302, I think
12 it's a relatively straightforward analysis. The lower
13 court should be reversed because they employed the wrong
14 legal standard and adopted, in essence, a - - - they really
15 applied 301 and said, you have to show basically many, many
16 more contacts than what you have pointed out. And that's
17 not the test.

18 302 is a single act statute that requires a
19 single act. We have this court's decisions in Rushaid and
20 Licci upheld personal jurisdiction when all the foreign
21 defendant did was transact wire transfers to New York
22 correspondent banks. And in the Rushaid case, you didn't
23 even have a New York plaintiff. We have a New York
24 plaintiff here. And in Rushaid, you had a plaintiff from
25 Saudi Arabia who was complaining about his employees who

1 took bribes for doing oil - - - manufacturing oil rigs in
2 Saudi Arabia.

3 And it was enough that they used correspondent
4 banks here. We have a very significant context by Bayer in
5 New York. Bayer raised fifteen billion dollars in bonds to
6 finance the Monsanto takeover. They hired lawyers in New
7 York and investment bankers in New York to negotiate the
8 transaction. A significant portion of the due diligence
9 for the sixty-three billion dollars acquisition of Monsanto
10 occurred in New York at the offices of Sullivan and
11 Cromwell, Bank of America, Credit Suisse, and Sidley
12 Austin. That's in the record at 319.

13 Defendant Baumann came to New York physically to
14 negotiate the final aspects of the acquisition. He had a
15 dinner at Aretsky's Patroon in midtown Manhattan to hammer
16 out the final details with the CEO of Manhattan while their
17 advisors dined at the office. That's in the record at 611.
18 The merger agreement required the closing to occur at the
19 New York offices of Sullivan and Cromwell.

20 In addition to the bridge finance, the actual
21 fifteen billion dollars in bonds, there was fifty billion
22 dollars in bridge financing that was done through New York.
23 The final fifty-seven billion dollars in cash that Bayer
24 needed to pay the Monsanto shareholders was done through
25 New York.

1 And we list many, many other - - - oh, the other
2 one, I think, is very important that was overlooked or
3 given short shrift by the lower courts was Bayer integrated
4 Monsanto after the deal was finalized into Bayer Crop
5 Sciences, which is a New York corporation - - - it's not a
6 foreign corporation - - - a New York corporation registered
7 to do business here. That's in the record at 298, 299.

8 So there's many other New York facts that we
9 alleged in the complaint, but these were more than enough
10 under this court's jurisprudence, including Rushaid and
11 Licci, to establish personal jurisdiction under the
12 guidelines of 302.

13 Now, on forum non conveniens, Your Honor, I want
14 to briefly touch on that because we have a statute here
15 that's very important, CPLR 327(b) that takes away the
16 power of the trial court to grant a forum non conveniens
17 motion - - -

18 CHIEF JUDGE WILSON: But that you didn't
19 preserve, right?

20 MR. BOTTINI: We disagree. We did preserve it.
21 We filed a motion for reargument before the trial court and
22 presented the underlying agreements to the Commercial
23 Division to demonstrate that there was a contract of a
24 million dollars or more. And I think this court's
25 jurisprudence says the issue on a motion to dismiss is

1 whether you have a cause of action, not whether you pled
2 it. And we filed - - - and said you can consider
3 affidavits, not just the complaint. And we submitted an
4 affidavit to the trial court to show there was these
5 contracts, the depository agreement and the bond agreement,
6 that - - - a million dollars or more, and they have
7 consents to New York jurisdiction and New York forum on
8 them. So on that basis - - - and it was briefed in front
9 of the First Department that rejected the arguments.

10 And so I think - - - and remember, 327(b) was - -
11 - it was also a very important legislative act that was
12 passed at the urging of the business community, because
13 businesses want the predictability of New York law, and
14 they were negotiating contracts with the New York choice
15 law on them. And then when they tried to file cases in New
16 York to enforce their rights, the courts were dismissing
17 them under forum non conveniens argument. So the
18 legislature passed 327(b) at the urging of the business
19 community to take away the ability of trial courts to grant
20 forum non conveniens motions. And so we think that's a
21 strong basis here - - -

22 JUDGE RIVERA: So your red light is on. What
23 about the 327(a)?

24 MR. BOTTINI: Well, under 327(a), I think that
25 there's a couple important things. One, Plaintiff is a New



1 York resident, and reversal is required because the lower
2 court did not give any credence to the plaintiff's choice
3 of forum. And one of the other factors that's important is
4 Plaintiff has a right to a jury trial, and the court
5 disregarded that and didn't give it any weight. Article 1,
6 Section 2 of the New York Constitution makes that
7 sacrosanct, the right to a jury trial. There's no right to
8 a jury trial in Germany.

9 And that's a very important right that was
10 factored in on the forum non conveniens analysis. And the
11 court didn't consider the plaintiff's choice of forum, so
12 they - - - so the lower court employed an incorrect legal
13 standard, which is subject to de novo review, even if the
14 weighing of the individual factors is subject to an abuse
15 of discretion.

16 And given the overwhelming New York facts of this
17 case, the due diligence and the financing in New York, all
18 - - - a significant portion of the witnesses and evidence
19 are going to be in New York, so a fair consideration of all
20 those factors requires reversal on the forum non
21 conveniens, even if you just look at 327(a) and don't
22 consider 327(b).

23 Thank you, Your Honors.

24 JUDGE SINGAS: Well, that's not really, though,
25 right? The board members, directors, all the witnesses are

1 in Germany, and all the breaching actions happened in
2 Germany.

3 MR. BOTTINI: It's correct, Your Honor, that the
4 directors are located in Germany. But again, that's not
5 the only consideration. The due diligence occurred in New
6 York, the financing and - - - one of our main - - -

7 JUDGE SINGAS: I was just trying to - - - I was
8 just - - - because you said all the witnesses were in New
9 York, so I was just pushing back on that.

10 MR. BOTTINI: Yeah. I didn't mean all the
11 witnesses, but certainly a significant portion of them,
12 Your Honor, I think that's a fair characterization.

13 CHIEF JUDGE WILSON: Thank you.

14 MR. BOTTINI: Thank you.

15 MR. SAVITT: May it please the court. William
16 Savitt, for the respondents. I fear the matter of the
17 internal affairs doctrine has been a bit picked over in the
18 past argument and a half, but - - -

19 JUDGE HALLIGAN: Can I ask you one question - - -

20 MR. SAVITT: Yeah. I - - - of cour - - -

21 JUDGE HALLIGAN: - - - about it before you move
22 on? If we look at the at the contemporaneous understanding
23 of what was happening. You know, you have the Stevens and
24 the Kessler view, you have the bar associations. And it's
25 not obvious to me that whatever revisions were made go to

1 the argument the bar associations were making, that they
2 were concerned that this was a, you know, disregard of
3 internal affairs. What's your response to that?

4 MR. SAVITT: My response is several fold. And I
5 do appreciate the opportunity to pick a little more at
6 these leftovers because I think it's important. The - - -
7 we have the Stevens article. The papers ventilate whether
8 that's legitimate - - -

9 JUDGE HALLIGAN: So - - -

10 MR. SAVITT: - - - legislative history. Leave
11 that to the side. I think my colleague at the bar, who was
12 here just before me, was correct in emphasizing this point,
13 the internal affairs doctrine, while it's been around for a
14 long time, was during the course of the 20th century, the
15 subject of an evolution from what was a jurisdictional
16 doctrine to what it's become, which is a choice-of-law
17 doctrine. I believe there are some number of cases, and I
18 can't say I'm familiar with them, from the mid-century
19 period that were agonizing over that shift. The 1961
20 revisions occurred in the midst of it. I also think the
21 point was fairly made that by - - -

22 JUDGE HALLIGAN: So your view, just to make sure
23 I understand, is that the criticism might be enmeshed in
24 the jurisdictional versus choice of law debate.

25 MR. SAVITT: That's right. I think there was

1 sorting out of that problem, which was a doctrinal puzzle
2 at the time, not so much anymore.

3 As to the City Bar, I think it really is fair to
4 note that while the correspondence was registered, it was
5 withdrawn, which supports many number of inferences,
6 including the inference that satisfaction was reached, that
7 the statute as enacted was not going to have the
8 deleterious effects that were suspected.

9 I will say this, that what's urged by counsel is
10 the proposition that the 1961 amendment so plainly
11 reflected a legislative policy to get to do away with the
12 internal affairs doctrine as it applies here. So obviously
13 did that in its legislative words, that for three
14 generations it's been not only overlooked, but completely
15 rejected in case after case after case. I would submit
16 that's an improbable outcome.

17 I'd also want to emphasize - - - and there won't
18 be any mistake about this - - - the position sponsored by
19 counsel here would make this state an absolute outlier
20 among the fifty. No other state in the Union has it.
21 Reference was made to California. It's true, California
22 has some wrinkles in respect of its application of the
23 internal affairs doctrine. Not this wrinkle. This would
24 be the only state with this rule.

25 JUDGE CANNATARO: What's your view of the purpose

1 of 1319?

2 MR. SAVITT: Your Honor, it's a great question.

3 JUDGE CANNATARO: Thanks.

4 MR. SAVITT: And I don't want to stand before you
5 and say I have a great answer. I do say this, we have - -
6 - and we said in our papers - - - and there is some
7 considerable legislative history that suggests that it was
8 in the nature of a list of an index of stat - - - of
9 provisions that might be applicable in the context of
10 foreign corporations. Look, if I were sitting where you
11 were, I would find that not an entirely satisfactory
12 explanation either, but it's the best one I can offer.

13 And I also want to say this, and I think it's
14 picking up, perhaps, the thread that Your Honor was
15 unspooling. I think the best way to read 620 - - - 1319
16 and 626 in the context of a dispute like this, is that 626
17 is, as my colleague, I think, correctly conceded, a
18 procedural statute. It applies to every lawsuit brought on
19 a derivative basis in the courts of New York, whether it's
20 in respect of a New York corporation or a foreign
21 corporation or an international corporation. It is, in a
22 sense, a floor. I think that's the right way of thinking
23 about it. It applies to this case. It applies. It
24 doesn't displace German law. It lives in harmony with
25 German law. You want to bring a derivative action in New

1 York, you've got to comply with 626. Foreign, New York,
2 that's the rule. Clear enough. But that doesn't mean that
3 you get to buy stock in a German corporation, make a
4 contract with the company, which a stock holding is in
5 contemplation of the relationship between companies and
6 their stockholders, and completely overthrow the rules.

7 JUDGE RIVERA: Now, let me go back to this thing
8 about it's a floor, because maybe you're saying, perhaps
9 more eloquently than I, that what it does is allow you to
10 bring the lawsuit, but then the substantive law of the
11 country in which you're incorporated is what applies. It
12 opens the courthouse door, but it doesn't mean you get to
13 stay there. You may end up being dismissed.

14 MR. SAVITT: Completely. Completely. I agree
15 with that entirely. And I think you've put it better than
16 I. But that is - - - that would be the view that we would
17 commend to make this statute work, which we think it does,
18 without displacing German substantive law and without
19 making New York a complete outlier.

20 And on the subject of procedure versus substance,
21 there's a lot in the papers, and I don't want to dwell on
22 this too much - - - and I have a few other things to say
23 about a few other aspects of the case - - - but this seems
24 to me to be important.

25 In the Davis case - - - which I'm reeducating



1 myself not to call Scottish Re, because somehow that's how
2 I always called it - - - the court went out of its way to
3 say, we got this Cayman case; it's procedural. And I think
4 it was procedural because, just like 626, you go to the
5 Cayman court with a derivative case, domestic, foreign,
6 whatever; it's the rule. Doesn't matter whether it's a
7 Cayman company. It doesn't matter what company it is. And
8 it distinguished that from the Canadian regime and the BVI
9 regime. Those regimes, this court instructed, were
10 substantive. And the reason they were substantive is that
11 they applied not on the basis of what court you were in,
12 but whose law created you as a corporation. They were
13 rules of corporate law, not of procedural law. They
14 defined the rights, duties and obligations of the
15 corporation.

16 And without getting into the details of it, be
17 assured Your Honors, the BVI statute and the Canadian
18 statute with the - - - which this court designated as
19 substantive - - - are essentially identical to the German
20 statute at issue here, because what they require is that
21 you go to a local court and you show your stockholding bona
22 fides, and you show that there is some merit to your claim,
23 and if you can't do that, you can't bring a derivative
24 action. Moreover, on the subject of substance, I think - -
25 -

1 JUDGE RIVERA: It creates a right for a subclass.

2 MR. SAVITT: It create - - - exactly right, Your
3 Honor. And it creates the right to go ahead and stand in
4 the shoes of a corporation. And it's important to keep in
5 mind - - - I know everyone knows this, but I just want to
6 put a moment's worth of emphasis on it - - - what we're
7 talking about here is who gets to control the assets of a
8 corporation, a litigation asset. And the idea that the
9 question who can bring a lawsuit, who can settle a lawsuit,
10 for how much, who can direct the business and affairs of a
11 German corporation isn't a matter of substance, I think is
12 verging on facetious. And yet that is the claim here.
13 It's a mere procedural rule. Your honors, it's not. And
14 that's why the law has developed - - - that's the why - - -
15 that's why the law has developed as it has.

16 I'm really happy to take on any questions the
17 court may have about the internal affairs doctrine, but was
18 suggested I pass on to the forum non issue, if that is
19 congenial to Your Honors.

20 As straightforward and important as the internal
21 affairs issue is, there's an important sense in which the
22 forum non issue in this case seems to be the simplest.
23 There are six factors that govern the forum non inquiry.
24 One is the burden on the New York courts principle in that
25 that inquiry is whose law obtains on the substance. Even

1 my good friend to my left concedes that it is German
2 substantive law that would govern the fiduciary duty
3 claims.

4 Burden on the defendants. The defendants, as was
5 just conceded, are all in Europe, most in Germany. They
6 would all have to come here. They'd all have to travel
7 here for trial.

8 The third question is, does the lawsuit arise
9 from actions taken in New York? The answer is no. And if
10 I have time, I'll get to the personal jurisdiction matters.
11 But this lawsuit alleges that this board made a decision to
12 enter into a merger inappropriately and with an entrenching
13 effect. That's what this lawsuit is about. It's not - - -

14 JUDGE HALLIGAN: So your view is that's the
15 relevant decision, not the closing. What about the closing
16 and related activities at a New York law firm?

17 MR. SAVITT: I do - - - Your Honor, I do think
18 that's a relevant decision, and I want to say it with real
19 emphasis. This is a claim for breach of fiduciary duty,
20 and the breach of fiduciary duty - - - and this is - - -
21 this is law across corporate law jurisdictions. It's when
22 the board takes a decision. It's the board.

23 JUDGE CANNATARO: Well - - -

24 MR. SAVITT: The board wasn't here for the
25 closing. That was ministerial, essentially executing the

1 will of the board once it's been taken, and the taking of
2 the decision was the making of the breach.

3 JUDGE CANNATARO: What about the due diligence?
4 That's where the fiduciary duty hits the road, really. And
5 the due diligence, so I heard, all took place in New York.

6 MR. SAVITT: Your Honor, I - - - the due
7 diligence is irrelevant. There is no evidence that any of
8 the due diligence took place in New York. It's not
9 pleaded. It's not true.

10 Now, the closing - - - the closing is said to
11 have occurred in New York. The closing happened everywhere
12 because closings are all virtual at this point, but not the
13 due diligence, Your Honor, the due diligence was not a New
14 York exercise. Monsanto was the target company. It isn't
15 in New York. It is in Missouri. The acquirer was in
16 Germany. The due diligence was not in New York.

17 JUDGE CANNATARO: Was the investigator hired to
18 do the due diligence New York-based?

19 MR. SAVITT: I don't know the answer to that. I
20 will say this - - - and now I'm surmising against interest
21 - - - the lawyers were New York lawyers, and among the
22 people doing the due diligence were no doubt some New York
23 lawyers, but that does not mean they were doing it in New
24 York. Certainly the subject matter of the due diligence
25 was nowhere near New York, had nothing to do with New York.

1 The board did not meet in New York. It met in Germany.

2 The board - - -

3 JUDGE RIVERA: I take your point that even - - -
4 or I think I may understand some of your point - - - is,
5 even if the New York lawyers are doing due diligence in New
6 York, there's a bunch of other due diligence going on, and
7 it's not in New York.

8 MR. SAVITT: I - - - that is correct, and I don't
9 think it is pleaded to the contrary, nor could it be. Nor
10 moreover do I think it is a sustainable or an accurate
11 statement of law to say that any time a New York lawyer
12 undertakes business respecting its clients hither, thither,
13 and yon, the matter becomes one properly before the New
14 York courts. But the answer to your question, Your Honor,
15 is yes.

16 Fourth factor is - - - is the evidence in New
17 York. The evidence is not in New York. The evidence is in
18 Europe nearly entirely. I'll add, moreover, that as the
19 court no doubt knows, there are very complex, difficult,
20 expensive matters of European data privacy and access to
21 evidence law that would have to be fought through by the
22 trial court here.

23 It is yet again a factor that weighs decisively
24 in favor of an order of a forum non conveniens. Is there
25 an alternative forum available? The answer is yes. It may

1 not have all the condiments and trappings that the
2 plaintiffs wish, but that is as a matter of law, not
3 relevant. It's true. There is no jury trial. The law is
4 clear on this already. That doesn't mean it's not an
5 available alternative forum.

6 Is - - - are the evidentiary rules the same? No.
7 They're different. But that doesn't mean that the courts
8 of this state need to exercise empire over every matter
9 that comes before them. This isn't just lawyer talking.
10 The cases are clear on the point. They're in our briefs.

11 Finally - - -

12 CHIEF JUDGE WILSON: And - - - but what is - - -
13 what is our standard of review over all of this?

14 MR. SAVITT: Thank you, Your Honor. The standard
15 of review - - - well, by all this, I - - - I - - -

16 CHIEF JUDGE WILSON: I mean the various factors.
17 There's findings from supreme court, right?

18 MR. SAVITT: The - - - the - - - this court held
19 in Pahlavi and it reaffirmed in the Estate of Kainer case
20 that the standard of review in a forum non conveniens is -
21 - - a dismissal - - - is de novo with respect to this
22 question, has the trial court considered the relevant
23 factors? But once it is found that the trial court has
24 considered the relevant factors - - - I'm now quoting - - -
25 "There has been no abuse of discretion reviewable by this



1 court, even if the court would have weighed those factors
2 differently."

3 That's in Kainer, and it's quoting Pahlavi, and
4 it emphasizes that this is an interesting but in important
5 ways, very significant abuse of discretion review. The - -
6 - as long as the trial court looks at the right things and
7 weighs them, which Justice Borrok plainly did here, the
8 matter is essentially unreviewable. And we would submit
9 that as this case. Though, for the reasons I've mentioned,
10 Your Honors, were the court to review it again, we think
11 the answer necessarily is the same.

12 There is this emphasis on the point that the
13 plaintiff here is from New York. First of all, that is not
14 determinative. It never has been. Second of all, the
15 plaintiff isn't from New York. The plaintiff - - - one of
16 the plaintiffs here is a New Yorker. But let's remember
17 who the actual plaintiff is. This plaintiff here doesn't
18 seek to bring a lawsuit. It seeks to cause Bayer to bring
19 a lawsuit. It seeks to make a German corporation a
20 plaintiff in this court. And here again - - -

21 JUDGE RIVERA: I don't know that that's the way
22 we look at that particular question.

23 MR. SAVITT: I hear you, Your Honor.

24 JUDGE RIVERA: These are the plaintiffs, and
25 you're conceding one is a New Yorker.

1 MR. SAVITT: One is a New Yorker, one's from
2 California - - -

3 JUDGE RIVERA: The other one is California.

4 MR. SAVITT: From California.

5 JUDGE CANNATARO: I mean, that's why we call
6 Bayer the nominal plaintiff, right?

7 MR. SAVITT: And I would commend to this court
8 for - - - this court's consideration the Bader against
9 Bader case, which - - - which is a First Department
10 decision. It cites and accepts the Supreme Court of the
11 United States decision in Koster which stands for the
12 proposition that in the context of a derivative action, it
13 is important to recognize that the relevant plaintiff
14 ultimately is the corporation.

15 And I don't want to overstate my position here.
16 I recognize that we have a New York plaintiff in some
17 sense, but that factor, even insufficient to overcome the
18 forum nonfactors in a normal case, is entitled to entitled
19 to considerably less deference in this case. That is our
20 position, and we think it's well supported in the case law.

21 JUSTICE LANDICINO: But it's not the typical
22 situation where the leadership of the corporation allows
23 for the corporation to bring an action. These are
24 shareholders who are acting on behalf of the corporation
25 other than those who otherwise manage the corporation,

1 correct?

2 MR. SAVITT: Precisely correct. These are
3 shareholders who are seeking, essentially, to seize the
4 levers of control of the corporation and bring this
5 lawsuit, not the management of the board itself.

6 JUDGE LANDICINO: The owners, right?

7 MR. SAVITT: Yeah.

8 JUDGE LANDICINO: Right.

9 MR. SAVITT: I - - -

10 JUDGE RIVERA: That's why it's a derivative
11 action, right?

12 MR. SAVITT: I'm sorry, Your Honor?

13 JUDGE RIVERA: That's why it's a derivative
14 action.

15 MR. SAVITT: Fair enough. That's why it's a
16 derivative action. But the lineup of the parties is a
17 little different in a derivative action. And that's the
18 point that I wanted to make. But even if this was a class
19 action or a normal commercial dispute, the forum non
20 factors, every one of them tilts decisively in one
21 direction, as Justice Borrok said after having
22 appropriately weighed these factors.

23 JUDGE CANNATARO: So we don't even have to
24 exercise deference.

25 MR. SAVITT: I think that's - - -



1 JUDGE CANNATARO: He did it so right, it - - -
2 our standard of review almost doesn't matter.

3 MR. SAVITT: Honestly, I think that's right. I -
4 - - the reading, the Pahlavi and the Kainer case, that
5 seems - - - the court has said twice now that as long as
6 the trial court - - - it's an abuse of discretion standard
7 in this way, as long as the court does the weighing, there
8 is no abuse. And that, I do think, is the repeated
9 teaching of this tribunal.

10 JUDGE SINGAS: And if we agreed with you on
11 forum, we wouldn't have to reach any of the other issues.

12 MR. SAVITT: If you agree with us on forum non,
13 you wouldn't have to reach the other issues, yes, that's -
14 - -

15 JUDGE RIVERA: Not even the BCL issue?

16 MR. SAVITT: I'm sorry, Your Honor?

17 JUDGE RIVERA: Not even the BCL issue?

18 MR. SAVITT: Not even the BCL issue. Not for our
19 case. I can't - - -

20 JUDGE RIVERA: You don't need to walk in the door
21 first for the court to decide a forum non conveniens motion
22 - - -

23 MR. SAVITT: I think that's right. It is - - -
24 in some even in contexts where the threshold matter is one
25 of strict subject matter jurisdiction, which I don't think

1 is this case. Even in that case, it is acceptable for a
2 trial or an appellate court like this one to dispose of a
3 matter on an alternative ground so as to avoid the issue.
4 I think that's well - - -

5 JUDGE CANNATARO: You used the word acceptable.
6 I'm just want to explore, for a quick second, preferred or
7 mandatory? Is there any order of operations in how you
8 parse these issues, or is it our choice? Do we just do
9 what we want?

10 MR. SAVITT: I think - - - I think it's your
11 choice. The reason I think I use that word, Your Honor, is
12 that it's conventional, and we are - - - as lawyers and
13 judges, we're - - - we're brought up to think about
14 jurisdiction first.

15 JUDGE CANNATARO: Uh-huh.

16 MR. SAVITT: So you think of jurisdiction first.
17 But I don't think there's any reason that matter has to go
18 before the forum nons issue, which - - - which is not
19 strictly speaking jurisdictional.

20 JUDGE CANNATARO: So you'll take the W however
21 you can get it.

22 MR. SAVITT: We'll take the W however we get it,
23 though - - -

24 JUDGE HALLIGAN: I know your red light is on, but
25 would the same be true in a federal court? Would you be

1 able to proceed with a forum non analysis before you decide
2 subject matter jurisdiction?

3 MR. SAVITT: I think the answer is yes. And in
4 fact, I think this is - - -

5 JUDGE HALLIGAN: I realize this is a sidebar.
6 Just curious.

7 MR. SAVITT: No. No, I think it's a principle
8 that I have - - - that I've seen in the first instance in
9 federal courts. In respect of the federal court, which,
10 unlike supreme court here is not a court of plenary or
11 general jurisdiction. It's - - - there's even a little
12 more heartburn about taking on the rendering, having not
13 had jurisdiction, but I have seen it done, Your Honor, and
14 I think it's acceptable.

15 327(b) - - - I will sit down soon because I know
16 my red light on, but let me say this. Not only was it
17 waived, which it was, it's not before this Court because
18 there was a grant of leave to appeal from the grant of
19 leave to appeal the 327(b) issue was expressly carved out.
20 It was the subject of the motion to reargue and renew. I
21 believe it was dated October - - - the reason I say this is
22 this court's order excluded from what's before it an order
23 dated October 22nd. It's not before the court. I wouldn't
24 want the court to think that 327(b) was a - - - that was a
25 legitimate argument. It's not for the reason we put in our

1 papers, but it's really not before the court on this
2 appeal. We're happy to stand on our papers for the matter
3 of personal jurisdiction if Your Honor should have no more
4 questions.

5 CHIEF JUDGE WILSON: Thank you.

6 MR. SAVITT: Thank you.

7 MS. BUCHWALD: Lara Samet Buchwald of Davis Polk
8 and Wardwell, on behalf of the bank respondents. I have
9 two minutes. I'll be quite judicious.

10 The banks moved to dismiss on four grounds. The
11 only ground that was reached with respect to the banks was
12 forum non conveniens. That's what the lower court reached.
13 It's how the Appellate Division affirmed.

14 I only have three quick points that I wanted to
15 make. The first is with respect to the standard of review.
16 We concur wholeheartedly with Mr. Savitt. This is not a de
17 novo standard. This is an abuse of discretion standard.
18 The trial court considered and applied those factors, and
19 that's really the end of the inquiry.

20 To the extent - - - and the second point is, to
21 the extent you reach those factors, all of the arguments
22 that Mr. Savitt marshaled are exactly correct about the
23 extent of the German contacts, the application of German
24 law, the complications surrounding that.

25 I'll just address one point that is bank

1 specific, because there were arguments that were made and
2 conclusory allegations that the banks are in New York. And
3 to be sure, two of the four banks that were named are U.S.
4 institutions, but that's because the institutions that were
5 named are wrong. And so it's in the appellate record,
6 through both declarations, through engagement letters, are
7 that the institutions that actually provided the banking
8 services, the financial advisory services, those were based
9 abroad. The work was done abroad. And that's - - -
10 there's a declaration that starts at page 153 of the
11 record, it then continues in large part at 360 to 406 of
12 the record, that includes the references to which entities
13 were providing those services and where those services were
14 provided. So to the extent that you're hearing the - - -

15 JUDGE RIVERA: Just to be - - - where is the due
16 diligence done, to the extent - - - did the banks do any
17 due diligence?

18 MS. BUCHWALD: Yeah. So it's - - - so the answer
19 is in large part - - -

20 JUDGE RIVERA: Yeah.

21 MS. BUCHWALD: - - - it happened in Germany, and
22 it happened in the UK. So with respect to the Bank of
23 America entities, those were German and Indian entities
24 that participated in Europe. With respect to Credit
25 Suisse, there are declarations that explain that the work

1 also took place largely - - - predominantly - - - not
2 entirely - - - but largely and predominantly in Europe. So
3 it's the same thing, the same type of non-U.S. based
4 decision making that happened with respect to the directors
5 and the officers that was also happening with respect to
6 their retained advisors.

7 JUDGE CANNATARO: So just check me on this for
8 one second. Since the grounds are - - - the only grounds
9 upon which you were granted dismissal by the court was
10 forum non, the only single grounds that this court could
11 use to resolve the entire appeal that would take care of
12 all of the defendants would be forum non, right?

13 MS. BUCHWALD: That's correct. I think our
14 position is no matter what you reach with respect to 1319
15 and 626 in the internal affairs doctrine, for us, we think
16 the forum non issue should be reached and should be
17 affirmed on the basis - - - as well.

18 JUDGE CANNATARO: Otherwise we can't dispose of
19 your appeal.

20 MS. BUCHWALD: Correct.

21 JUDGE RIVERA: Well, how - - - well, not if you -
22 - - not if they can't bring the action. They can't bring
23 the action - - - you can't - - -

24 MS. BUCHWALD: They - - -

25 JUDGE RIVERA: - - - you cannot continue an



1 action against you.

2 MS. BUCHWALD: That - - - that's fair. And we
3 did - - -

4 JUDGE RIVERA: In a way, you're out.

5 MS. BUCHWALD: - - - for example, move to dismiss
6 on grounds that were not reached, including a 3211(a)(7)
7 type failure to state a claim for that very reason. But
8 yes.

9 JUDGE RIVERA: Can you address this issue of
10 whether or not we could simply resolve the case on forum
11 non conveniens without addressing the BCL, whether or not a
12 court can consider forum non conveniens without resolving
13 this other question - - -

14 MS. BUCHWALD: Sure. I - - -

15 JUDGE RIVERA: - - - of whether or not they even
16 have standing and can - - - and can - - -

17 MS. BUCHWALD: Sure. I agree with - - -

18 JUDGE RIVERA: - - - bring a lawsuit.

19 MS. BUCHWALD: - - - Mr. Savitt, which is the law
20 is clear that you don't have to reach the personal
21 jurisdiction issue first. You can reach forum non first.
22 There's discretion to do that. That is fine.

23 JUDGE RIVERA: The subject matter jurisdiction?

24 MS. BUCHWALD: With - - -

25 JUDGE RIVERA: You said personal jurisdiction.



1 MS. BUCHWALD: So correct. Excuse me.

2 JUDGE RIVERA: Okay.

3 MS. BUCHWALD: The only other point I would make,
4 only because there was only a moment to hit it at the end,
5 is with respect to 327(b), which is the second provision of
6 the CPLR subsection (a), which says you may, in the
7 interest of justice, dismiss; and then (b), which brings
8 that back a little bit.

9 And with respect to 327(b), I think there's a
10 whole water flow of it - - - waterfall of issues here. The
11 first is it's not within the grant of the February 22nd,
12 2024 order that allowed - - - that provided leave.

13 Then there's the second issue, which is it was
14 never before the lower court properly because it wasn't
15 raised in connection with the motion to dismiss. It was
16 raised first in connection with the motion to renew and
17 reargue, and it was dismissed or denied there.

18 And then the third piece, in terms of whether it
19 arose out of these contracts. These contracts post-date
20 these decisions, post-date the diligence by quite a
21 significant amount of time. So there's a temporal issue.

22 There's an important piece with respect to the
23 banks as well, because if you look at 327(b), it actually
24 has two clauses. It says, in other words, what you are
25 doing is looking at whether parties choose New York law for

1 their contracts. And if so, then sometimes that functions
2 as a consent to the forum. But for the banks, we're not
3 parties to these contracts. We never sign them. There's
4 no element of consent. So if you look at look at the final
5 clause of 327(b), there's no conceivable way that even if
6 that issue were reached, it could ever apply to disturb the
7 ruling with respect to the banks.

8 CHIEF JUDGE WILSON: Thank you.

9 MS. BUCHWALD: Thank you.

10 MR. BOTTINI: I want to raise one point I think
11 is important that I didn't have an opportunity to discuss,
12 which was the fact that the trial court committed error by
13 not granting us jurisdictional discovery, and I think
14 that's very important because, given the overwhelming
15 context of this transaction, the sixty-three billion dollar
16 transaction to New York, we certainly made enough of a
17 start to allege jurisdictional facts that we should have
18 been given discovery. Now, that discovery, in turn, would
19 have been very important on the forum non conveniens
20 motion. And so the court should reverse on that basis and
21 send it back - - -

22 JUDGE RIVERA: How so? Which - - - what - - -
23 which one of the factors might that have gone to?

24 MR. BOTTINI: Well, certainly the - - - for
25 example, the location of the witnesses and the evidence,

1 Your Honor. I mean, we allege that a substantial part of
2 the due diligence occurred in New York. They're stuck with
3 that allegation on a motion to dismiss, and yet my
4 colleague stands up in controversy. He says that's not
5 true.

6 Now, not only is it not enough that they can't
7 controvert, it's just false. Credit Suisse, one of the
8 bank defendants here, submitted an affidavit that's part of
9 the record. It's on record at page 393. And there it's an
10 affidavit from a Credit Suisse employee who says the
11 personnel who worked on Bayer's acquisition of Monsanto
12 were primarily based in Frankfurt, London, and New York.
13 So they admitted a substantial portion of the due diligence
14 occurred in New York, and now, they get up and try to
15 misrepresent it before this court.

16 And the due diligence, as Your Honor mentioned,
17 is critical to our allegations. The entire allegation of
18 the complaint is that the Roundup lawsuits were not
19 properly investigated. It's cost them over ten billion
20 dollars in settlements since the deal closed. When they
21 began negotiations for the deal, there were 1,000 Roundup
22 lawsuits filed. By the time they got close to signing the
23 deal and closing it, there were 10,000 Roundup lawsuits
24 filed. They didn't do adequate due diligence on the deal.
25 And it doesn't matter, even, if the due diligence occurred

1 in Germany, the directors hired investment bankers and
2 lawyers to do the due diligence, and of course, a
3 substantial part was in New York. They were required to do
4 due diligence about the Roundup lawsuits. The roundup
5 lawsuits are in the United States, not in Germany - - -

6 JUDGE RIVERA: So then our position accepting the
7 factual assertions in the complaint as true, drawing all
8 reasonable inferences therefrom that the court abused its
9 discretion under - - -

10 MR. BOTTINI: Yes, Your Honor.

11 JUDGE RIVERA: Okay. Is that because of the due
12 diligence issue that in - - - there's, at a minimum, some
13 factual question as to how much of this due diligence was
14 conducted in New York? Is that - - -

15 MR. BOTTINI: It - - -

16 JUDGE RIVERA: - - - the basis for the abuse of
17 discretion? Is there more?

18 MR. BOTTINI: Yes. And we also think it should
19 be de novo because the court employed the wrong criteria -
20 - - the legal standard. They didn't give Plaintiffs choice
21 of forum anyway. And under New York law, you have to give
22 substantial weight to a New York plaintiff's choice of
23 forum. And the lower court also didn't take into
24 consideration the plaintiff's right to a jury trial, which
25 is a constitutional right that needs to be weighed. So we

1 think it should be reversed under either a de novo standard
2 or an abuse of discretion. The due diligence issue
3 certainly goes to the location of the witnesses and the
4 evidence.

5 And again, the jurisdictional discovery we were
6 entitled to. We didn't get it. I mean, sixty-three
7 billion dollar acquisition that's closed in New York,
8 negotiated by New York lawyers, investment bankers.
9 Fifteen billion in bonds issued out of New York. The
10 closing occurs in New York, and we're not giving any
11 jurisdictional discovery. The jurisdictional discovery
12 would have shed significant light on the forum non
13 conveniens analysis. And again, 1319 safeguarded our
14 client a right to maintain an action in New York.

15 And one last thing on forum non conveniens. I
16 think it's very important to take into consideration that
17 this is a right under Chapter 13. 13 is dealing with
18 foreign corporations, and what the trial court really did
19 is say, well, you have an adequate alternative forum in
20 Germany. Think about it. If you dismiss lawsuits when the
21 legislature safeguarded you to file a case in New York,
22 under the rationale, you can file it in the foreign
23 jurisdiction. Every case involving Chapter 13 is a foreign
24 court. There's always going to be another jurisdiction.

25 And other cases have pointed that out and said,

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if you just say there's an adequate alternative forum, you're completely undermining the legislative intent to afford a New York forum. As long as the foreign corp is doing business in New York, and especially because we had a New York plaintiff.

And for those reasons, the court should reverse on the failure to give us jurisdictional discovery and on the forum non conveniens issues.

CHIEF JUDGE WILSON: Thank you.

MR. BOTTINI: Thank you, Your Honors.

(Court is adjourned)

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C E R T I F I C A T I O N

I, Christian C. Amis, certify that the foregoing transcript of proceedings in the Court of Appeals of Hausmann v. Baumann, No. 3 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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