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| **Haussmann v Baumann** |
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| 2021 NY Slip Op 51232(U) |
| Decided on December 27, 2021 |
| Supreme Court, New York County |
| Borrok, J. |
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| This opinion is uncorrected and will not be published in the printed Official Reports. |

Decided on December 27, 2021

Supreme Court, New York County

**Rebecca R. Haussmann, Trustee of Konstantin S. Haussmann Trust, and Jack E. Cattan, Derivatively on Behalf of Bayer AG, Plaintiff,**

**against**

**Werner Baumann, Werner Wenning, Liam Condon, Paul Achleitner, Oliver Zuhlke, Simone Bagel-Trah, Norbert Bischofberger, Andre Van Broich, Ertharin Cousin, Thomas Elsner, Johanna Hanneke Faber, Colleen Goggins, Heike Hausfeld, Reiner Hoffmann, Frank Lollgen, Wolfgang Plischke, Petra Reinbold-Knape, Detlef Rennings, Sabine Schaab, Michael Schmidt-Kiebling, Otmar Wiestler, Norbert Winkeljohann, Clemens Borsig, Thomas Fischer, Petra Kronen, Sue Hodel Rataj, Thomas Ebeling, Klaus Sturany, Heinz Georg Webers, Christian Strenger, Bayer Corporation, BOFA Securities, Inc.,Bank of America Corporation, Credit Suisse Group AG, Sullivan & Cromwell LLP, Linklaters LLP, Bayer AG, Horst Baier, Robert Gundlach, Credit Suisse AG, Defendant.**

Index No. 651500/2020
Andrew Borrok, J.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 206, 209 were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 207, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230 were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 199, 200, 201, 202, 203, 204, 205, 208, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252 were read on this motion to/for DISMISSAL.

Bank of America Corporation (**BAC**), BofA Securities, Inc. (**BofA Securities**, and, together with BAC, the **BofA Entities**), Credit Suisse Group AG (**CSGAG**), and Credit Suisse AG (**CSAG**, and, together with CSGAG, the **Credit Suisse Entities**, and the Credit Suisse Entities together with the BofA Entities, the **Banks**)'s motion to dismiss must be granted and the Second Amended Complaint (the **SAC**, NYSCEF Doc. No. 35) must be dismissed because this court lacks jurisdiction under CPLR 302(a)(1) and pursuant to CPLR 327 because this case has only a tenuous connection to New York and has a much greater connection to Germany where the case should have been brought.

The gravamen of the dispute in this shareholder derivative action is that the directors, none of whom live in New York, personally transacted business in New York, or met with anyone in New York, breached their fiduciary duties in approving the $66 billion acquisition of Monsanto (the **Moonshot Transaction**). The hiring of New York based lawyers (and closing out of a firm's New York office) and funding through New York banks is simply not sufficient to ground jurisdiction in New York based on the German Board's alleged breach of fiduciary duty (i) in structuring the Moonshot Transaction with cash and debt (i.e., as opposed to stock) to make Bayer unattractive to a potential purchaser of Bayer; (ii) by ultimately approving the Moonshot Transaction at the allegedly highly inappropriate $66 billion price; and (iii) by failing to properly assess the substantial exposures that Monsanto faced, all of which undeniably occurred elsewhere. Stated differently, this dispute does not arise out of the defendants' contacts with New York and the defendants cannot be said to have purposefully availed themselves of the benefit of the New York forum. (*Cf. In re Renren, Inc. Deriv. Litig.*, 2020 WL 2564684 [Sup Ct, NY County 2020]). For the avoidance of doubt, the court does not have personal jurisdiction as against any of the individual director-defendants because none of them live here, conduct business here regularly or had contacts with New York that give rise to this dispute.

In addition, Bayer (hereinafter defined) is a German Company and German law governs this dispute. While the Commercial Division, New York County regularly hears disputes involving the application of foreign law and could certainly do so here, it is a greater burden on the New York court than it would be on a German court. All of the directors of Bayer are located outside of the United States. None live in New York. It is beyond cavil that defending this action in New York would hoist a substantial and unnecessary burden on the defendants, and Germany presents an alternative forum.[FN1] Thus, the burden on the New York court would be substantial in comparison to that on the German court and dismissal pursuant to CPLR 327 is therefore also appropriate. (*Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 479 [1984]; *Kreutter v McFadden Oil Corp.*, 71 NY2d 460 [1988]; *see also Holzman v Guoqiang Xin*, 2015 WL 5544357 [SD NY 2015]).

Finally, Bayer AG's **(Bayer)** motion must also be granted because, pursuant to the internal affairs doctrine, the Plaintiffs (hereinafter defined) lack standing under German law to bring this action because the Plaintiffs made no attempt whatsoever

to satisfy the prerequisite condition that they seek leave from the German court to bring this action and do not appear to have, in any event, sufficient holdings under German law.

**The Relevant Facts and Circumstances**

This case involves Bayer's 2018 alleged rushed $66 billion acquisition of Monsanto Inc. (**Monsanto**) consummated without proper due diligence at a grossly inflated price structured with substantial debt to prevent Bayer from being taken over, and in an attempt to entrench management. Bayer is a German corporation incorporated under the German Stock Corporation Act (**GSCA**) and headquartered in Germany. Pursuant to the GSCA, Bayer is run by a Board of Management and a Supervisory Board. Monsanto is a Missouri corporation.

According to Plaintiffs, the pharmaceutical industry was going through significant consolidation with companies using mergers and acquisitions to grow and gain products (NYSCEF Doc. No. 35, ¶23) rather than grow organically from within. Bayer was an attractive takeover candidate because of its broad shareholder base, profitability, cash flow, and minimal debt (*id.*, ¶25). Indeed, according to the Plaintiffs, rumors circulated as early as 2008 that Pfizer was considering a takeover of Bayer (*id.*). Bayer had also been involved in its own acquisitions and on multiple occasions had contemplated an acquisition of Monsanto. The Plaintiffs allege, however, that Bayer's long standing CEO, Marijn Dekkers, had opposed and prevented prior attempts to acquire Monsanto because of Monsanto's track record and controversial reputation including PCB, DDT and Agent Orange fiascos and the growing cancer controversy concerning Roundup (*id.*, ¶6).

In January 2016, Mr. Dekkers retired. He was succeeded by Werner Baumann, who worked alongside the Supervisory Board Chair Werner Wenning (NYSCEF Doc. No. 35, ¶ 3). Mr. Baumann and Mr. Wenning assured shareholders that they did not plan any radical changes (*id.*, ¶6). However, subsequently, in May 2016, in a complete about face, Bayer made an unsolicited offer to acquire Monsanto for $60 billion (*id.*). This $60 billion offer to acquire Monsanto was unsolicited and at a 44% premium over market value (*id.*, ¶7). This, according to the Plaintiffs, was done without proper due diligence and

constituted a breach of fiduciary duty. According to Plaintiffs, Mr. Dekkers reluctance to consider a Monsanto acquisition was not without basis. Monsanto had been implicated in several controversies prior to Bayer's offer. The $60 billion offer was not accepted. Undeterred, and allegedly out of fear based on the news that, in April 2016, Pfizer's pending $160 billion acquisition of Allergan was terminated (*id.*, ¶26), as a result of which Bayer might now be a Pfizer target, Bayer increased its offer by $6 billion and consummated the Moonshot Transaction for $66 billion.

Plaintiffs allege that the Moonshot Transaction was "the worst merger in history — certainly in German history" and that it was motivated by "an attempt to entrench the Bayer Board and CEO and protect them from a possible takeover of Bayer, which they had learned might be in the air and were determined to avoid as it would cost them their lucrative and prestigious positions" (NYSCEF Doc. No. 35, ¶9). The $60 billion offer was denounced by Bayer's owners and shareholders (*id.*, ¶8). They further allege that Mr. Baumann and Mr. Wenning "wanted to use the Monsanto acquisition as a 'poison pill' to ward off a feared takeover of Bayer that would cost them — and all their supervisors — their positions of power, prestige and profit atop Bayer" (*id.*, ¶ 22). More specifically, Plaintiffs allege that Moonshot Transaction was structured to be paid in all cash (*id.*, ¶27), and financed with substantial debt which a potential acquirer would have to assume, thus acting as a poison pill so that Bayer could not be acquired (*id.*) and so that a shareholder vote could be avoided because no new Bayer shares were issued (*id.*, ¶28).

Bayer hired New York based Wachtell Lipton Rosen & Katz to do the deal and the deal was closed at Sullivan & Cromwell also in New York (NYSCEF Doc. No 35, ¶ 272; NYSCEF [*2]Doc. No. 175, at 5). None of the defendants were present at the closing and no board meetings took place in New York in connection with the due diligence or otherwise in authorizing the deal. The debt was raised from the defendant banks, denominated in US dollars and governed by NY law. (NYSCEF Doc. No. 175, at 6). Bayer is a German company with ADRs offered in the US. The Plaintiffs allege that they are "in the process of having their shares registered pursuant to their written request under Section 67(1)" of the GSCA. Monsanto was a Missouri based company.

As a result of the Moonshot Transaction, Bayer has been "crushed by a tsunami of Monsanto legacy tort suits and legacy liabilities" which has cost Bayer over $12 billion and allegedly collapsed Bayer's stock price (NYSCEF Doc. No. 35, ¶¶9, 11). In April 2019, Bayer's shareholders voted 55% to show no confidence in Bayer's Board of Management and Supervisory Board, "the first time in history such a vote occurred in a German public company" (*id.*, ¶31). Bayer's stock hit an all-time low in in 2020 and Mr. Wenning quit his position as the Supervisory Board Chair (*id.*, ¶15).

Bayer's wholly owned subsidiary Bayer Corporation operates in the United States. Plaintiffs in this case are the alleged owners of 2,317 shares of Bayer's German common stock — based on US ADR holdings. The individual defendants are/were members of Bayer's Board of Management or Supervisory Board or directors/officers of a subsidiary or controlled entity of Bayer (the individual defendants, together with Bayer Corporation, hereinafter, collectively, the **Bayer Defendants**).

Plaintiffs brought this derivative action alleging that the individual defendants failed to obtain adequate information on the Moonshot Transaction, breached their duties to Bayer and violated GSCA §117, and abused their control of Bayer to advance their personal interests. Plaintiffs also allege that the Banks influenced the individual defendants to act to Bayer's disadvantage and were negligent in their duties to Bayer in violation of GSCA §117, and that the Board of Management and Supervisory Board also breached their fiduciary duties to Bayer by violating GSCA §117. Plaintiffs assert that jurisdiction is proper here under New York's long arm statute. As discussed more fully below they are not correct.

**Discussion**

On a motion to dismiss, "the pleading is to be afforded a liberal construction" and the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). However, "allegations consisting of bare legal conclusions, as well as factual claims inherently incredible or flatly contradicted by

documentary evidence are not entitled to such consideration (*Caniglia v Chicago Tribune-New York News Syndicate, Inc.*, 204 AD2d 233, 233-234 [1st Dept 1994]). CPLR 3211(a)(1) provides for dismissal on the ground that "a defense is founding upon documentary evidence." "The documentary evidence must resolve all factual issues and dispose of the plaintiff's claim as a matter of law" (*Foster v Kovner*, 44 AD3d 23, 28 [1st Dept 2007]). CPLR 3211(a)(7) provides for dismissal on the ground that "the pleading party fails to state a cause of action."

***The SAC Must Be Dismissed Against the Bank Defendants (Mtn. Seq. No. 003)***

The Banks argue that the SAC must be dismissed as against them because (i) this matter should be heard in Germany, (ii) the Plaintiffs named the wrong entities in the SAC, and (iii) the SAC fails to state a cause of action as against the Banks.

CPLR 327 codifies the common law doctrine of forum non conveniens. Under CPLR 327, a court may dismiss an action if it "finds that in the interest of substantial justice the action should be heard in another forum." The resolution of a motion to dismiss on forum non conveniens grounds is left to the sound discretion of the trial court *(Islamic Republic of Iran v Pahlavi*, 62 NY2d at 479).

Courts consider the burden on New York courts, potential hardship to the defendant, the unavailability of an alternative forum in which the plaintiff may bring suit, the residence of the parties, and whether the transaction at issue arose primarily in a foreign jurisdiction (*id.*). Significantly, the plaintiff's choice of forum should rarely be disturbed unless the balance is strongly in favor of the defendant, and a substantial nexus between New York and the action is lacking (*Waterways, Ltd. v Barclays Bank PLC*, 174 AD2d 324, 327 [1st Dept 1991]; *Elmaliach v Bank of China Ltd.*, 110 AD3d 192, 208 [1st Dept 2013]).

Dismissal of the SAC under CPLR 327(a) is appropriate. German law applies to this derivative action involving a German company where the decisions at issue and where the alleged breach of fiduciary took place in Germany. None of the individual defendants are located in New York. The current members of Bayer's Board of Management all live in Europe,

and no member has lived in New York during their service on the board (Aff. of Dr. Markus Arnold, Head of Corporate Office at Bayer, NYSCEF Doc. No. 59, ¶5). Additionally, every member of the Board of Management who served during from January 1, 2016 until the Moonshot Transaction closed on June 7, 2018 resided in Europe and no member resided in New York during the time they served on the board (*id.*, ¶6). All of the meetings of the Board of Management from January 1, 2016 through February 9, 2021 took place in Germany and Bayer's Board of Management's books and records are maintained in Germany (*id.*, ¶¶7-8). Of the members of Bayer's Supervisory Board, both the current members and the members who served between January 1, 2016 and June 7, 2018, the majority reside in Europe and none reside in New York (Aff. of Dr. Stephan Semrau, Head of Law Corporate of Bayer, NYSCEF Doc. No. 57, ¶¶6-7). The meetings of the Supervisory Board between January 1, 2016 and February 7, 2021 all took place in Germany, and the board's books and records are maintained in Germany (*id.*, ¶¶8-9).

With regard to the investment bankers involved with the Moonshot Transaction, BAC is a Delaware-incorporated entity with its principal executive offices in North Carolina (Aff. of Lara Buckwald, Counsel for the BofA Entities, NYSCEF Doc. No. 43, ¶7). CSGAG is a Switzerland-incorporated entity with its headquarters in Switzerland (Aff. of Daniel Kläy, Director of CSGAG, NYSCEF Doc. No. 53, ¶2). But the Bayer Defendants received the advice of the banks in Germany, where the Bayer Defendants were located and where all meetings of the Supervisory and Management Board occurred.

Additionally, although, the Commercial Division in New York County is well equipped to apply foreign law, the burden here is significant (*see Estate of Kainer v UBS AG*, 175 AD3d 403, 405 [1st Dept 2019]) and Germany presents an adequate alternative forum (*see Bluewaters Communications Holdings, LLC v Ecclestone*, 122 AD3d 426, 428 [1st Dept 2014]). As noted above, the Plaintiffs' argument that because of the costs involved, no suit could be brought there fails. The Porsche Litigation is proof positive that Germany presents a suitable alternative forum and in fact, Germany has a significant interest in adjudicating a dispute involving an old and major German company, and the activities and judgments of individual directors all located in Germany and operating under German law (*Shin-Etsu Chem. Co., Ltd. v ICICI Bank Ltd.*, 9 [*3]AD3d 171, 178 [1st Dept 2004]). Therefore, dismissal pursuant to CPLR 327 is appropriate.

For completeness, the Banks' argument that the SAC must be dismissed against them because they are not the entities which Bayer engaged to provide advisory and financial services (i.e., that the Plaintiffs sued the wrong entities) fails at this stage of the proceedings. The basis for the Plaintiffs' SAC does not rest on whether the Banks violated the terms of the retention agreements. The Plaintiffs allege that, under the GSCA, the Banks unduly exerted influence on the Bayer Defendants to act to the disadvantage of the company and its shareholders (*see* GSCA §117). Given that the Banks ***themselves*** indicated in their own public disclosure statements that they had represented Bayer in the Moonshot Transaction, they cannot now merely disavow those representations based on engagement letters (NYSCEF Doc. Nos. 45, 46 and 52) with their affiliates to provide advisory services. Were this case to go forward in this Court, should discovery prove that they did not in fact provide advisory services, they might well be entitled to dismissal on this ground as well.

***The SAC Must Be Dismissed against the Bayer Defendants (Mtn. Seq. No. 004)***

The Bayer Defendants also argue that this action must be dismissed pursuant to CPLR 327. For the reasons set forth above, they are correct and the SAC must be dismissed against the Bayer Defendants.

Additionally, the Bayer Defendants allege that this court lacks personal jurisdiction over them as well. This is also correct.

CPLR 302(a)(1) provides for jurisdiction over any non-domiciliary who, either in person or through an agent, transacts business within the state or contracts to supply goods or services within the state. The parties do not dispute that the individual defendants did not come to New York to transact business with respect to the Moonshot Transaction, and the Plaintiffs have not sufficiently alleged that the Bayer Defendants transacted business in New York through an agent related to the harms alleged as to the Moonshot Transaction.

The seminal case discussing long arm jurisdiction established through an agent is *Kreutter v McFadden Oil Corp.*, 71 NY2d 460 (1988). In *Kreutter*, Albert Kreutter, a resident of New York, invested $70,000 in Brian McFadden and Company,

Inc. (**McFadden Company**), a Texas corporation headquartered in New York City. After various transfers involving McFadden Oil Corporation (**McFadden Oil**) and Harmony Drilling Company, Inc. (**Harmony**), both Texas corporations, and Eugene Downman, a Texas resident who owned Harmony and exercised management control over McFadden Oil, McFadden Company paid the balance of the funds to Harmony to buy certain oil rights to be leased back to Harmony. Mr. Kreutter, however, received nothing for his money, so he sued in New York state court.

Mr. Downman argued the court lacked jurisdiction over him personally because he did not transact business in New York nor as the corporate agent of McFadden Oil or Harmony. He further argued that because Mr. Kreutter's claims did not arise out of the McFadden Oil's business, but out of the leaseback investment with Harmony and Harmony did not transact business within New York, jurisdiction was not proper in New York.

The Court disagreed, holding that NY jurisdiction was proper. The McFadden Company, in which Mr. Kreutter invested, had its headquarters in New York and engaged in purposeful activities in New York, including in relation to Mr. Kreutter's transaction, which was for the benefit of, and with the knowledge and consent of, the Texas defendants, which defendants exercised control over the New York-headquartered McFadden Company. The Court reasoned that jurisdiction over McFadden Oil was proper because the sale-leaseback of the oil rig was [*4]presented to Mr. Kreutter as a transaction with McFadden Oil and that jurisdiction over Harmony was proper because Harmony transacted business in the state. The Court further explained that Harmony used the McFadden Company to secure Mr. Kreutter's investment, paid the McFadden Company for its service, and received the balance of Mr. Kreutter's invested funds directly from the McFadden Company. Lastly, the Court rejected Harmony and Mr. Downman's argument that the conduct of McFadden Company could not be attributed to them because there was no agency relationship between them because the sole reason that Mr. Kreutter did not know about the relationship with the McFadden Company is because Harmony and Downman used McFadden Oil to conceal their involvement. Thus, the Court of Appeals found an agency relationship and held that jurisdiction was proper over all defendants.

This is not *Kreutter*. That Bayer engaged New York-based attorneys and arranged funding through New York institutions simply does not constitute purposeful availment as it relates to the cause of action, which relates to due diligence activities as to a Missouri-based company and the decisions made in Germany to proceed with the acquisition forming the basis of this lawsuit. It is simply too tenuous of a connection to New York. Investors in Bayer—a German company, based in Germany, and listed on German stock exchanges—are from all over the world, and the decision to keep the investment in Bayer and not sell based on the understanding that Bayer would not make changes in its corporate direction was not tied to any particular New York-related contact or activity. Thus, dismissal as to the Bayer Defendants based on lack of personal jurisdiction is also appropriate.

**The SAC Must be Dismissed Against Bayer (*Mtn. Seq. No. 005)***

This lawsuit also must be dismissed against Bayer because the Plaintiffs lack standing under German law. As Bayer rightfully asserts, the internal affairs doctrine requires application of German law to determine whether the Plaintiffs have standing to bring this derivative suit (*see Renren, Inc. v XXX*, 67 Misc 3d 1219(A), at *24 [Sup Ct, NY County 2020]). Under GSCA §148, shareholders whose aggregate shareholdings equal or exceed one percent of the registered share capital may request the court's permission to assert claims, and leave shall be granted if (i) the shareholders provide evidence that they purchased the shares prior to the point in time they became aware of the alleged breaches or alleged damages, (ii) the shareholders provide evidence that they called upon the company to take legal action, (iii) there are facts justifying the suspicion that the damages were incurred due to dishonest conduct or gross violation of the law or the articles of association, and (iv) there are no overriding reasons that the company's interests would preclude the assertion of the claim for compensatory damages (*see* NYSCEF Doc. No. 112). The Plaintiffs have not alleged that they own a sufficient number of shares to assert their claims, that they made a demand upon the company to take legal action, or that they have sought permission from a German court to assert their claims. The Plaintiffs thus, under applicable German law, lack standing to bring this action, and the action must be dismissed.

It is accordingly hereby ORDERED that the SAC is dismissed in its entirety.

Dated: December 27, 2021

Andrew Borrok, J.S.C.

## Footnotes

**Footnote 1:***See Viking Glob. Equities, LP v Porsche Automobil Holding SE*, 101 AD3d 640 (1st Dept 2012) (the **Porsche Litigation**).

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