

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

IN RE JPMORGAN CHASE  
DERIVATIVE LITIGATION

No. 2:13-cv-02414-KJM-EFB

ORDER

This Document Relates to All Actions.

Shareholders have brought a derivative suit against a corporation's directors for their allegedly deceitful and financially-destructive role in the 2008 housing collapse. Defendants are current and former JPMorgan Chase & Co. ("JPMorgan") directors. Plaintiffs are California-based shareholders. Plaintiffs argue defendants breached their fiduciary duties, committed securities violations, and unjustly enriched themselves through defendants' creation and sale of subprime residential mortgage-backed securities ("RMBS"). The court granted defendants' first motion to dismiss. Order Oct. 23, 2014, ECF No. 69 ("Prior Order"). Defendants have moved to dismiss plaintiffs' amended complaint, or alternatively, to transfer the case to New York. *Id.* Mot., ECF No. 123.

The court heard the motion on December 15, 2016. Alexandra Summer, Francis Bottini, Jr., Mark Molumphy and Kelsey Fischer appeared for plaintiffs. Mins., ECF No. 139. Stuart Baskin, Alethea Sargent and Emily Griffen appeared for defendants Bell, Bowles, Burke, Crown, Flynn, Futter, Jackson, Novak, Raymond and Weldon. *Id.* Gary Kubek and Christopher

1 Banks appeared for nominal defendant JPMorgan and defendants Dimon, Harrison and Lipp. *Id.*  
2 As explained below, the court GRANTS defendants' motion to dismiss in part and TRANSFERS  
3 the remaining claims to the Southern District of New York.

4 I. BACKGROUND

5 Plaintiffs complain that defendants fraudulently and carelessly mishandled  
6 JPMorgan's residential mortgage-backed securities business. First Am. Compl. ¶¶ 1, 2, ECF  
7 No. 122 ("FAC"). Understanding plaintiffs' claims in full at this point requires a brief review of  
8 the mortgage industry in which JPMorgan operates.

9 A. Residential Mortgage-Backed Securities and the 2008 Financial Crisis

10 Residential mortgage-backed securities or RMBS are bonds backed by payments  
11 homeowners make on their mortgage loans. *See id.* ¶ 10. JPMorgan uses a process known as  
12 "securitization" to bundle hundreds of mortgage loans into RMBS, which they then market and  
13 sell to investors. *Id.* JPMorgan groups or tiers their RMBS based on a risk rating. Risky or  
14 subprime RMBS form the lower, cheaper tiers, while safer RMBS form the more expensive tiers.  
15 *Id.* ¶¶ 44–45. RMBS are considered subprime or risky when they are backed by mortgagers with  
16 impaired credit records, while safer RMBS are backed by more reliable mortgagers. *Id.*  
17 Investors choose a tier in which to invest and then their profits mirror the payments mortgagers  
18 make. The values of the RMBS fluctuate depending on whether homeowners pay down their  
19 mortgage principal early, refinance their mortgages or default.

20 After the housing market collapsed in 2008, RMBS investors experienced  
21 significant fluctuation in returns on investment because foreclosures increased and home prices  
22 and interest rates plummeted. *Id.* ¶ 10. The downturn exposed flaws in JPMorgan's RMBS  
23 protocol and enflamed investors who felt defrauded and misled. Plaintiffs here contend the  
24 named directors played a key role in JPMorgan's misconduct in issuing RMBS. *Id.* ¶¶ 3, 9, 188,  
25 291, 315, 388–89.

26 B. Criminal Investigation into JPMorgan's RMBS Activity

27 Investors' fraud allegations prompted the United States Department of Justice  
28 ("DOJ") and various federal and state agencies to investigate whether JPMorgan's RMBS

1 practices violated criminal laws. *Id.* ¶ 17. On November 15, 2013, JPMorgan announced a \$4.5  
2 billion settlement with 21 major institutional investors, and four days later announced a \$13  
3 billion settlement with the Department of Justice and other government agencies. *Id.* ¶ 5.  
4 Approximately \$300 million of the settlement funds were allocated to investors from California.  
5 *Id.* This settlement hinged on JPMorgan’s RMBS conduct between 2005 and 2007: JPMorgan  
6 admitted it falsely marketed and sold compromised RMBS to investors without warning them the  
7 RMBS did not meet the corporation’s internal securitization standards. *Id.* ¶¶ 6, 238, 300, 331.  
8 The settlement did not resolve an ongoing criminal investigation against JPMorgan originating in  
9 this district, the Eastern District of California. FAC ¶¶ 5, 49, 189, 366.

### 10 C. Shareholder Derivative Suits

11 In this case, three JPMorgan shareholders sue JPMorgan’s directors for their  
12 alleged involvement in RMBS activity from 2005 to 2007, focusing particularly on this activity’s  
13 impact in California. *Id.* at 65–88. This suit is one of many derivative suits attacking  
14 JPMorgan’s mishandling of RMBS during the financial crisis, which point to the resulting billion  
15 dollar settlements as proof of damages. Courts uniformly have dismissed these derivative suits at  
16 the outset, at least in part, for not meeting Federal Rule of Civil Procedure 23.1(b)’s pleading  
17 requirements.<sup>1</sup>

18 Rule 23.1(b)(3) requires that shareholders bringing derivative suits specifically  
19 plead what efforts they undertook to have a corporation’s board of directors file the suit on the  
20 corporation’s behalf; in other words, did shareholders make a pre-suit demand on the board that

---

21  
22 <sup>1</sup> See, e.g., *Wietschner v. Dimon*, 32 N.Y.S.3d 77, 79 (N.Y. App. Div.), *leave to appeal*  
23 *denied sub nom*, *Wietschner v. Dimon*, 28 N.Y.3d 901 (N.Y. 2016); *City of Roseville Employees’*  
24 *Ret. Sys. v. Dimon*, 135 A.D.3d 566 (N.Y. App. Div. 2016); *Espinoza ex rel. JPMorgan Chase &*  
25 *Co. v. Dimon*, 807 F.3d 502, 508 (2d Cir. 2015); *City of Providence v. Dimon*, No. CV 9692-  
26 VCP, 2015 WL 4594150, \*6 (Del. Ch. July 29, 2015) (finding plaintiffs precluded from  
27 relitigating demand futility), *aff’d*, 134 A.3d 758 (Del. 2016); *Cent. Laborers’ Pension Fund v.*  
28 *Dimon*, No. 14 CIV. 1041 PAC, 2014 WL 3639185, \*1 (S.D.N.Y. July 23, 2014), *aff’d*, 638 F.  
App’x 34 (2d Cir. 2016); *Steinberg v. Dimon*, No. 14 CIV. 688 PAC, 2014 WL 3512848, at \*5  
(S.D.N.Y. July 16, 2014); *Asbestos Workers Phila. Pension Fund v. Bell*, 990 N.Y.S.2d 436  
(N.Y. Sup. 2014); *In re JPMorgan Chase & Co. Deriv. Litig.*, No. 12 CIV. 03878-GBD, 2014  
WL 1297824, at \*1 (S.D.N.Y. Mar. 31, 2014); *In re Bear Stearns Co., Inc. Sec., Deriv., & ERISA*  
*Litig.*, 763 F. Supp. 2d 423, 541–43 (S.D.N.Y. 2011); *In re Goldman Sachs Grp., Inc. S’holder*  
*Litig.*, No. CIV.A. 5215-VCG, 2011 WL 4826104, \*12 (Del. Ch. Oct. 12, 2011).

1 was rejected? Alternatively, the Rule requires that shareholders plead the specific reasons they  
2 have not asked the board to bring their claims; to show why a demand on the board would have  
3 been futile. Fed. R. Civ. P. 23.1(b)(3)(A), (B) (providing that the complaint must “(3) state with  
4 particularity—(A) any effort by the plaintiff to obtain the desired action from the directors or  
5 comparable authority and, if necessary, from the shareholders or members; and (B) the reasons  
6 for not obtaining the action or not making the effort.”); *Potter v. Hughes*, 546 F.3d 1051, 1062  
7 (9th Cir. 2008). A derivative suit cannot proceed without showing either demand refusal or  
8 excusal. Fed. R. Civ. P. 23.1(b)(3).

9 A separate derivative suit brought in the Southern District of New York, and  
10 dismissed there, is particularly relevant here. See *Steinberg v. Dimon*, 2014 WL 3512848  
11 (S.D.N.Y. July 16, 2014). Defendants argue *Steinberg*’s judgment precludes plaintiffs from re-  
12 litigating similar claims and issues here. Mot. at 4–8. In *Steinberg*, a shareholder derivatively  
13 sued fifteen JPMorgan directors in New York for breaching their fiduciary duties, wasting  
14 corporate assets, unjustly enriching themselves, and violating section 14(a) of the Securities  
15 Exchange Act of 1934, 15 U.S.C. § 78n(a) (“Securities Act”). See Baskin Decl., Ex. D (*Steinberg*  
16 Compl.), ECF No. 124-4. The New York district court dismissed the complaint for insufficiently  
17 pleading demand futility under Rule 23.1. *Steinberg*, 2014 WL 3512848 at \*5.

18 D. This Case

19 Plaintiffs contend defendants exposed JPMorgan to financial risk and ruin through  
20 the corporation’s subprime mortgage business by destabilizing internal standards and controls,  
21 fraudulently marketing RMBS, and concealing material information from investors. FAC ¶ 10.  
22 Plaintiffs bring three California state claims and one federal claim. They made no pre-suit  
23 demand on JPMorgan’s board and allege doing so would have been futile. *Id.* ¶ 296 (“making a  
24 demand would be a futile and useless act as the majority of JPMorgan’s directors are not able to  
25 conduct an independent and objective investigation of the alleged wrongdoing”).

26 Plaintiffs’ state law claims allege: (1) Defendants breached their fiduciary duties  
27 by putting their own pecuniary interests above the company’s; (2) defendants wasted corporate  
28 assets by compensating executives and directors for illegal conduct; and (3) defendants unjustly

1 enriched themselves. *Id.* ¶¶ 357, 370, 373. Plaintiffs’ fourth federal claim alleges certain named  
2 defendants violated section 14(a) of the Securities Act by issuing false and misleading 2011 and  
3 2012 proxy statements that lured shareholders into blindly reinstating leadership incumbents and  
4 approving risky proposals. *Id.* ¶¶ 377–95. Plaintiffs name defendants Bowles, Burke, Cote,  
5 Crown, Dimon, Futter, Jackson, Raymond and Weldon in connection with both proxy statements,  
6 defendants Gray and Novak regarding only the 2011 proxy statement, and defendant Bell  
7 regarding only the 2012 proxy statement. *Id.* ¶¶ 378–79.

8 E. Prior Dismissal and Amended Complaint

9 The court dismissed plaintiffs’ prior complaint in 2014, with leave to amend. *See*  
10 Prior Order; First Consolidated Compl., ECF No. 29; Defs.’ First Mot. Dismiss, ECF No. 48.  
11 The court found defendants lacked sufficient ties to California to sustain personal jurisdiction as  
12 to plaintiffs’ state claims and that plaintiffs’ federal claim failed under Rule 12(b)(6). Prior Order  
13 at 24. After two years of jurisdictional discovery, plaintiffs filed the operative first amended  
14 complaint. *See* Order Granting Discovery, ECF No. 92; FAC (filed April 28, 2016). Although  
15 the amended complaint raises the same four claims as stated in the original complaint, it offers  
16 more detail about JPMorgan’s California-specific RMBS business, FAC at 65–88, bolsters  
17 plaintiffs’ theories and explanation as to why JPMorgan’s proxy statements were misleading, and  
18 changes the relief sought under its federal claim, *compare* Compl. ¶¶ 304–08, *with* FAC ¶¶ 377–  
19 95. Defendants now revive their initial jurisdictional arguments in seeking to dismiss the  
20 amended complaint. Plaintiffs oppose, Opp’n, ECF No. 132, and defendants reply, ECF No. 133.

21 II. ORDER OF ANALYSIS

22 Defendants raise multiple jurisdictional inquiries and so the court must first  
23 consider the proper order of analysis. *Potter*, 546 F.3d at 1055; *see also Ruhrgas AG v. Marathon*  
24 *Oil Co.*, 526 U.S. 574, 584 (1999) (explaining although “subject-matter jurisdiction necessarily  
25 precedes a ruling on the merits, the same principle does not dictate a sequencing of jurisdictional  
26 issues”) (citation omitted). A federal court must independently ensure it has subject matter  
27 jurisdiction over every claim and personal jurisdiction over every party. The parties do not  
28

1 dispute the court’s subject matter jurisdiction here: The federal claim presents a federal question  
2 and the state law claims satisfy diversity jurisdiction. FAC ¶ 18.

3 The parties do dispute the court’s personal jurisdiction over defendants with  
4 respect to the state law claims. Mot. at 14–19; Opp’n at 22–24. Because JPMorgan is neither  
5 incorporated in California nor principally located here, FAC ¶ 23, defendants argue plaintiffs  
6 have not shown each defendant has sufficient contacts with California to trigger this court’s  
7 personal jurisdiction over them. California’s personal jurisdiction standard requires that each  
8 defendant have at least some minimum contacts with California to warrant haling them into court  
9 here. *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 800 (9th Cir. 2004) (citing Fed.  
10 R. Civ. P. 4(k)(1)(A)). Defendants’ argument based on absence of contacts is warranted as to the  
11 state claims, as discussed below.

12 Plaintiffs’ federal claim, however, derives from the federal Securities Act, which  
13 confers “personal jurisdiction over the defendant in any federal court” provided “[the] defendant  
14 has minimum contacts with the United States . . . .” *Sec. Investor Prot. Corp. v. Vigman*, 764  
15 F.2d 1309, 1316 (9th Cir. 1985) (citing 15 U.S.C. § 78(a)(a)); *Touche Ross & Co. v. Redington*,  
16 442 U.S. 560, 577 (1979). JPMorgan is a Delaware corporation with its principal place of  
17 business in New York, and the individual defendants are citizens of the United States, FAC ¶¶ 23,  
18 27–40; *Vigman*, 764 F.2d at 1316. Personal jurisdiction adheres as to the federal claim.

19 If plaintiffs’ federal claim withstands dismissal, and if plaintiffs’ state claims  
20 factually relate to their federal claim, the court has discretion to exercise pendent personal  
21 jurisdiction over the defendants as to all claims in this suit without separately analyzing  
22 defendants’ relationships with California. *See Action Embroidery Corp. v. Atl. Embroidery, Inc.*,  
23 368 F.3d 1174, 1181 (9th Cir. 2004).

### 24 III. PENDENT PERSONAL JURISDICTION

25 If plaintiffs’ state claims “arise[] out of the same nucleus of operative facts” as the  
26 federal claim that granted the court personal jurisdiction, the court may exercise personal  
27 jurisdiction over defendants with respect to the entire case. This discretionary pendent personal  
28 jurisdiction doctrine derives from “considerations of judicial economy, convenience and fairness

1 to litigants.” *Id.* (internal citation and quotation marks omitted). Claims are sufficiently factually  
2 related to trigger the doctrine when a plaintiff ““would ordinarily be expected to try them all in  
3 one judicial proceeding.”” *Rep. of the Phil. v. Marcos*, 862 F.2d 1355, 1359 (9th Cir. 1988)  
4 (quoting *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966)). That claims advance  
5 different theories of liability does not diminish their factual relatedness. *See, e.g., CollegeSource,*  
6 *Inc. v. AcademyOne, Inc.*, 653 F.3d 1066, 1070–73 (9th Cir. 2011) (finding pendent personal  
7 jurisdiction where federal and state claims all based on corporation’s misappropriating college  
8 catalogs).

9 Here, the court previously found plaintiffs’ state and federal claims sufficiently  
10 factually related to trigger pendent personal jurisdiction. *See* Prior Order at 23. Plaintiffs’  
11 amended complaint maintains the same factual basis for their claims and defendants raise no new  
12 arguments to challenge their factual relatedness. *Compare* Compl. ¶¶ 191–212, *with* FAC  
13 ¶¶ 263–84. Plaintiffs’ state law claims are rooted in allegations that defendants dragged  
14 JPMorgan into the risky RMBS business, manufactured a culture of security law violations,  
15 poorly managed JPMorgan’s employees, and ultimately forced JPMorgan into a position of  
16 having to agree to multi-billion-dollar settlements. *See* FAC ¶¶ 356–76. Plaintiffs’ federal claim  
17 is based in allegations that JPMorgan’s proxy statements mischaracterized its leadership’s risk  
18 management and internal controls. *Id.* ¶¶ 377–95. Plaintiffs say, in essence, the proxy statements  
19 were misleading because they did not disclose the wrongs plaintiffs allege in their state law  
20 claims. *Id.* Plaintiffs’ state and federal claims derive from the same basic factual allegations.

21 Even if the interest of judicial economy warrants exercising pendent personal  
22 jurisdiction over defendants as to plaintiffs’ state law claims, jurisdiction fundamentally is not  
23 established. If plaintiffs’ federal claim cannot proceed, any pendent personal jurisdictional hook  
24 vanishes.

#### 25 IV. FEDERAL CLAIM

26 As noted, defendants move to dismiss plaintiff’s federal claim, arguing that a  
27 New York district court’s dismissal of a related shareholder derivative suit precludes the claim  
28 here as a matter of law. Mot. at 13 (citing *Steinberg*, 2014 WL 3512848, at \*5).

1           The doctrines of claim preclusion and issue preclusion define whether a prior  
2 judgment has a preclusive effect. Under claim preclusion, “[a] final judgment on the merits of an  
3 action precludes the parties or their privies from relitigating issues that were or could have been  
4 raised in that action.” *Federated Dep’t Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981) (internal  
5 citation omitted). Conversely, issue preclusion bars “successive litigation of an issue of fact or  
6 law actually litigated and resolved in a valid court determination essential to the prior judgment,”  
7 even if the issue recurs by way of a different claim. *New Hampshire v. Maine*, 532 U.S. 742,  
8 748–49 (2001). By “preclud[ing] parties from contesting matters that they have had a full and  
9 fair opportunity to litigate,” these two doctrines protect against “the expense and vexation  
10 attending multiple lawsuits, conserve[] judicial resources, and foster[] reliance on judicial action  
11 by minimizing the possibility of inconsistent decisions.” *Montana v. United States*, 440 U.S. 147,  
12 153–54 (1979).

13           The *Steinberg* court dismissed the derivative suit before it, finding the plaintiff  
14 there inadequately pled demand futility. Before assessing whether claim or issue preclusion  
15 applies, this court thus examines the demand futility requirements in shareholder derivative suits  
16 as relevant here.

17           A. Proving Demand Futility Under Delaware Law

18           Under Federal Rule of Civil Procedure 23.1(b), a plaintiff may bring a  
19 shareholder derivative suit only if she “allege[s] with particularity the efforts, if any, made by the  
20 plaintiff to obtain the action the plaintiff desires from the directors.” *Potter*, 546 F.3d at 1056.  
21 Failure to so allege is excusable only if demand would have been futile. Fed. R. Civ. P. 23.1.

22           To assess whether demand is futile, the court applies the law of the state in which  
23 the corporation is incorporated. See *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 109 n.10  
24 (1991). JPMorgan is incorporated in Delaware. FAC ¶ 23. Delaware law provides two different  
25 demand futility inquiries, depending on if the suit challenges board conduct and judgment in  
26 general, as compared to an affirmative board decision See *Wood v. Baum*, 953 A.2d 136, 140  
27 (Del. 2008). If a derivative suit challenges a decision the corporate board made, the court  
28 evaluates demand futility under the two-pronged *Aronson* test. See *Aronson v. Lewis*, 473 A.2d

1 805, 815 (Del. 1984), *overruled on other grounds by Brehm v. Eisner*, 746 A.2d 244 (Del. 2000).

2 Under this test, the court first evaluates the directors' independence and disinterestedness and  
3 then focuses on the substance of the challenged transaction and the directors' approval of it. *See*  
4 *id.* at 814.

5 When a derivative claim does not challenge a particular decision the board made  
6 as a whole, *Rales* governs. *See Rattner v. Bidzos*, 2003 WL 22284323, at \*8 (Del. Ch. 2003)  
7 (citing *Rales v. Blasband*, 634 A.2d 927, 934 (Del. 1993)). Under *Rales*, a court must determine  
8 whether the plaintiffs' particularized factual allegations raise a reasonable doubt, at the time the  
9 plaintiffs filed suit, about the board's ability to properly exercise its independent and disinterested  
10 business judgment in responding to a demand. *Id.* (citing *Rales*, 634 A.2d at 934). If the  
11 derivative plaintiffs satisfy this burden, demand is excused as futile. *Id.* So, under Delaware law,  
12 when shareholders allege board misconduct but do not identify a specific board decision, the  
13 court considers the claim's merit to assess whether it raises a reasonable doubt that a majority of  
14 the board of directors were "incapable of making an impartial decision regarding the pursuit of  
15 the litigation." *Wood*, 953 A.2d at 140. One way to raise reasonable doubt is to show a majority  
16 of the board faced a "substantial likelihood" of personal liability from the legal action that has  
17 been brought. *Rales*, 634 A.2d at 936 (citation omitted). In making this assessment, courts focus  
18 on strength of the underlying claim's merits: The higher the chance of success on the claim the  
19 more likely demand as to that claim is futile.

20 To determine if the *Steinberg* court's Rule 23.1(b) dismissal precludes plaintiffs  
21 from litigating a claim or issue in this court, the court must decide initially whether federal or  
22 state preclusion rules govern.

### 23 B. Choice of Law for Preclusion Analysis

24 Determining which preclusion law governs depends on the nature of the  
25 potentially precluding judgment. If a federal court sitting in diversity jurisdiction issued the  
26 arguably precluding opinion, then the preclusion rules of the state in which that court sits would  
27 apply. *Taylor v. Sturgell*, 553 U.S. 880, 891 (2008) (citing *Semtek Int'l Inc. v. Lockheed Martin*  
28 *Corp.*, 531 U.S. 497, 507–08 (2001)). But if the prior case rested on a federal question, then

1 federal courts apply the “federal rule[s]” of res judicata, which the United States Supreme Court  
2 has ultimate authority to declare. *Semtek*, 531 U.S. at 508; *Heiser v. Woodruff*, 327 U.S. 726, 733  
3 (1946) (“It has been held in non-diversity cases since *Erie R. Co. v. Tompkins*, that the federal  
4 courts will apply their own rule of res judicata.”); *First Pacific Bancorp, Inc. v. Helfer*, 224 F.3d  
5 1117, 1128 (9th Cir. 2000) (“When considering the preclusive effect of a federal court judgment,  
6 we apply the federal [preclusion] law.”) (citation omitted).

7 Here, federal common law determines *Steinberg*’s preclusive effect because  
8 *Steinberg* addressed a federal question. That *Steinberg* also involved state law claims does not  
9 change this court’s conclusion because the *Steinberg* court considered those claims on the basis of  
10 supplemental jurisdiction only. *Steinberg* Compl. ¶ 9.

### 11 C. Federal Issue Preclusion

12 Issue preclusion or collateral estoppel prevents parties from relitigating the same  
13 issues actually adjudicated in an earlier judgment. This narrow doctrine applies only “[w]hen an  
14 issue of fact or law is actually litigated and determined by a valid and final judgment, and the  
15 determination is essential to the judgment.” *B & B Hardware, Inc. v. Hargis Indus., Inc.*, 135 S.  
16 Ct. 1293, 1303 (2015) (citation and quotations marks omitted).

17 Defendants contend that because the members of the board of directors sued here  
18 are the same board members upon whom *Steinberg* attempted to show demand was futile, the  
19 *Steinberg* court’s Rule 23.1(b) dismissal bars plaintiffs from re-litigating demand futility as to  
20 their federal claim. Because plaintiffs must prove demand futility before proceeding on their  
21 federal claim, concluding that issue preclusion applies would defeat their claim. The parties  
22 dispute only whether the demand futility question in *Steinberg* was “identical” to the demand  
23 futility question raised here.

#### 24 1. Federal Common Law on Identity of Demand Futility Issue

25 Whether the demand futility inquiry in one case presents an identical question in a  
26 later derivative suit against the same board is a question of first impression under the federal  
27 common law. Three published circuit court opinions have addressed this question, but all three  
28 pertained to state preclusion law; they do not help shape federal law, although the reasoning

1 advanced in each may be persuasive. *See In re Sonus Networks, Inc., S'holder Derivative Litig.*,  
2 499 F.3d 47 (1st Cir. 2007); *Freedman v. Redstone*, 753 F.3d 416 (3d Cir. 2014); *Arduini v. Hart*,  
3 774 F.3d 622 (9th Cir. 2014). As detailed below, *Sonus*, *Freedman* and *Arduini* together stand for  
4 the principle that two questions must be answered in determining whether a dismissal for failure  
5 to plead demand futility with respect to a corporate board in one case bars a shareholder from  
6 relitigating demand futility as to that same board in a later suit. First, are the factual differences  
7 between the first and second suit such that the inquiry into the directors' interestedness is  
8 different in the latter. Second, are the different facts plaintiffs include in the second suit truly  
9 "new" in the sense that they were unavailable to the plaintiff at the time of the first suit.

10 a. First Circuit's *Sonus* Opinion

11 The First Circuit's *Sonus* opinion articulated a rule that if one court determines  
12 demand is futile as to a particular board of directors, issue preclusion bars subsequent attempts to  
13 relitigate demand futility against the same board unless a later complaint includes "new" factual  
14 allegations that alter the demand futility inquiry. *Sonus*, 499 F.3d at 62-63. The *Sonus* court  
15 explained that although the shareholder-plaintiffs there had included different facts in their  
16 second suit, those facts were not "new" because they had always been available; the plaintiffs just  
17 chose not to plead them in the first suit. *Id.*

18 Although persuasive, *Sonus* does not control in this case because that decision was  
19 based on Massachusetts preclusion law, which leniently applies issue preclusion's "identity"  
20 element. *See id.* at 62. Specifically, the *Sonus* court cited a Massachusetts case, noting its  
21 proposition that "even if there is not complete identity between the issues, issue preclusion may  
22 be appropriate where the issues overlap substantially." *Id.* (parenthetical following citation to  
23 *Comm'r of Dept. of Employment & Training v. Dugan*, 697 N.E.2d 533, 537 (Mass. 1998)). This  
24 more lenient "substantial overlap" standard is not endorsed in the federal common law.

25 b. Third Circuit's *Freedman* Opinion

26 The Third Circuit in *Freedman* tackled the same question as did the First in *Sonus*  
27 but reached a different conclusion. In *Freedman*, the shareholder-plaintiffs derivatively sued a  
28 corporation's board of directors in state court in New York, where the corporation's principal

1 place of business was located, and the state court dismissed the complaint for failure to show  
2 demand futility as to certain directors. 753 F.3d at 420, 425. The shareholders then sued the  
3 same board seven years later in federal court. *Id.* at 426. Their second complaint included factual  
4 allegations that the first suit did not. *Id.* The defendants argued the earlier New York decision  
5 precluded plaintiffs from relitigating demand futility as to a particular board member, but the  
6 district court disagreed and found issue preclusion did not bar plaintiffs from relitigating demand  
7 futility. *See Freedman v. Redstone*, No. 12-cv-1052-SLR, 2013 WL 3753426, at \*1 (D. Del. July  
8 16, 2013). It reasoned that the inquiry called for into director disinterestedness and independence  
9 was not necessarily the same in the second suit because the relevant relationships might have  
10 changed in the seven years between the two suits. *Id.* at \*7.

11           The Third Circuit affirmed the district court decision, explaining that under New  
12 York law “a prior ruling on a director’s independence does not necessarily apply in a future  
13 proceeding addressing the same topic,” because “[a] determination of a director’s independence  
14 [ ] is concerned with a possibly fluid relationship and, accordingly, differs from the determination  
15 of a fixed historical fact in the first litigation. . . .” *Freedman*, 753 F.3d at 425. The *Freedman*  
16 court highlighted the differences between each suit’s factual allegations and focused on the seven-  
17 year gap between their presentation to the court. *Id.* at 426 (“it would be inappropriate” to  
18 assume the director had the same relationship with an executive after seven years lapsed). Unlike  
19 *Sonus*, the *Freedman* court did not focus on whether the new facts included in the second suit  
20 were known and available at the time of the first suit; instead, the court focused on how much the  
21 facts and circumstances differed between the two suits as framed by plaintiff’s complaint.  
22 Although persuasive, *Freedman* applied New York preclusion law; it did not contribute to the  
23 federal common law on issue preclusion.

24           c. The Ninth Circuit’s *Arduini* Opinion

25           The Ninth Circuit in *Arduini* reviewed both *Freedman* and *Sonus* in finding that a  
26 Nevada state court’s dismissal of a prior suit based on demand futility precluded *Arduini* from  
27 relitigating demand futility in federal court. *Arduini*, 774 F.3d at 630–32 (reviewing preclusive  
28 effect of *Fosbre v. Matthews*, 2010 WL 2696615, at \*1 (D. Nev. 2010)). The Circuit endorsed

1 the *Sonus* approach, focusing on whether the new allegations bore on the level of directors’  
2 interestedness and whether the facts were unavailable at the time of the first suit. *Id.* at 632  
3 (citing *Sonus*; concluding allegations in Arduini’s second complaint did not raise any new facts  
4 regarding interestedness of relevant board members). It also explained that even under  
5 *Freedman*’s approach preclusion applied because Arduini’s demand futility allegations “[we]re  
6 essentially identical to those raised in *Fosbre*.” *Id.* at 638. In making this finding, the *Arduini*  
7 court referenced counsel’s concession that “the suit was identical to [the prior suit,] *Fosbre*.” *Id.*  
8 at 630. But, like *Sonus* and *Freedman*, *Arduini* also applied state preclusion law and did not  
9 develop the federal common law.

10 Each opinion nonetheless provides a persuasive backdrop for this court’s analysis.

## 11 2. Discussion

12 The parties dispute whether *Steinberg* precludes plaintiffs from asserting demand  
13 futility here. Defendants argue issue preclusion applies, but plaintiffs contend issue preclusion  
14 does not bar the court from analyzing demand futility as to their federal claim because the claim  
15 differs materially from that presented by *Steinberg*. If the demand futility issue here is “identical”  
16 to the issue in *Steinberg*, then plaintiffs’ federal claim fails as a matter of law under Rule 23.1.

### 17 a. *Steinberg*’s Demand Futility Inquiry

18 In *Steinberg*, the New York district court dismissed a derivative suit against  
19 JPMorgan because the complaint did not contain sufficient facts to satisfy demand futility. In that  
20 case, *Steinberg*, the shareholder plaintiff, brought three state claims and one federal claim against  
21 fifteen current and former directors. *See Steinberg Compl.* ¶¶ 244–84. *Steinberg*’s federal claim,  
22 which informs the preclusion analysis here, alleged violations of section 14(a) of the Securities  
23 Act based on the directors’ allegedly misleading proxy statements. *Id.* ¶¶ 273–84. *Steinberg*  
24 claimed that making a demand on the board to bring this claim would have been futile, citing  
25 eight director-defendants’ alleged lack of independence to conclude a majority of the board’s  
26 eleven members were “interested.” *See id.* ¶¶ 206, 210–39. Because the parties agreed demand  
27 was futile as to one director, Board Chair Dimon, the court considered only the independence of  
28 seven, non-management director defendants. *Steinberg*, 2014 WL 3512848, at \*5.

1 To analyze demand futility as to these seven directors, the *Steinberg* court framed  
2 the rule as follows: Demand is futile “whenever a majority of the board of directors faces a  
3 ‘substantial likelihood’ of personal liability” in the face of the particular claim being analyzed.  
4 *Id.* (citing *Rales*, 634 A.2d at 936). To assess whether the directors faced a “substantial  
5 likelihood” of liability, the court analyzed each claim’s merits separately. *Id.* If a claim had a  
6 substantial likelihood of success, demand would be futile as to that specific claim.

7 The court concluded the likelihood of success of Steinberg’s federal claim was  
8 low, and therefore found demand was not futile as to that claim. *Id.* The court explained that the  
9 board’s mere “execution of . . . financial reports, without more, is insufficient to create an  
10 inference that the directors had actual or constructive notice of any illegality.” *Id.* (citing *Wood*,  
11 953 A.2d at 142). The court added that “Steinberg must establish scienter, and again fails to do  
12 so,” saying “[the federal claim] is far too general and there is no essential link from the  
13 misstatements to the shareholder approval sought.” *Id.* (citation omitted). The court concluded,  
14 “[a]s a result, it is unlikely that any of the [seven] [d]irectors breached his or her fiduciary duty in  
15 connection with the alleged misrepresentations, and therefore demand cannot be excused on this  
16 basis.” *Id.* The court dismissed Steinberg’s federal claim because the complaint did not show the  
17 directors faced a “substantial likelihood” of liability on that claim such that it was reasonable to  
18 doubt their ability to exercise disinterested and independent judgment in considering a demand.  
19 *Id.*

20 b. Comparison Between Plaintiffs’ and Steinberg’s Demand Futility  
21 Inquiry

22 Whether the *Steinberg* dismissal bars plaintiffs from litigating demand futility in  
23 this court depends on how similar the demand futility inquiry is when comparing the two cases.  
24 The strength of the underlying claims for which demand was required or excused is critical in  
25 determining the identity of the two demand inquiries. A claim’s strength directly affects the  
26 nature of the demand futility analysis because a director is more likely to refuse to bring a claim  
27 that may implicate his or her own conduct if that claim is likely to succeed. This is the rationale  
28 that prompted Delaware courts to establish the “substantial likelihood of success” theory. *See*

1 generally *Rales*, 634 A.2d 927. So, if the federal claim here has a stronger likelihood of success  
2 than Steinberg’s federal claim, the demand futility issue is not “identical” across the two suits.

3 In both cases the shareholders focus their section 14(a) Securities Act claims, in  
4 part, on JPMorgan’s 2011 and 2012 proxy statements. But the specific misstatements and  
5 omissions identified within those two statements differ in the two complaints. In this case,  
6 plaintiffs cite misstatements about the director nominees’<sup>2</sup> independence and about the board’s  
7 recommendation to vote against the shareholder proposal to divest Dimon of his role as chairman.  
8 FAC ¶¶ 264–68. In her case, Steinberg alleged JPMorgan’s proxy statements were false and  
9 misleading because they did not disclose “the true financial condition of the [c]ompany” and “the  
10 true state of the [c]ompany’s risk management structure.” Steinberg Compl. ¶¶ 91–92. Also,  
11 plaintiffs here seek only “injunctive and equitable relief,” FAC ¶ 394, whereas Steinberg sought  
12 damages and an order “void[ing] the election of [the director nominees].” Steinberg Compl.  
13 ¶¶ 117–18. This difference in relief matters because by seeking only injunctive relief, plaintiffs  
14 in this case enjoy a presumption of causation that Steinberg did not. *See Mills v. Elec. Auto-Lite*  
15 *Co.*, 396 U.S. 375, 384 (1970). In contrast, Steinberg’s inadequate allegations regarding  
16 causation provided one reason the court found demand was not futile on her federal claim.  
17 *Steinberg*, 2014 WL 3512848, at \*12–13.

18 Because plaintiffs here have a greater likelihood of success on the merits of their  
19 federal claim than Steinberg did, the demand futility issue here is not “identical” to the demand  
20 futility issue in *Steinberg*. Plaintiffs’ federal claim is not barred by issue preclusion.

21 The court’s conclusion here does not hinge on whether the second suit in this case  
22 and in *Steinberg* added allegations that were available at the time of the first suit. A focus on the  
23 availability of facts at an earlier time is better suited to analysis of the broader claim preclusion  
24 doctrine.

25 ////

26  
27 <sup>2</sup> A director nominee is “[a]n individual who is given the role of a non-executive  
28 director on the firm’s board of directors, in place of another person. . . .” *Nominee Director*  
*Definition*, Black’s Law Dictionary (2d Online Ed.).

1           D. Federal Claim Preclusion

2           Defendants argue that, even without issue preclusion, res judicata bars plaintiffs  
3 from bringing their Securities Act claim because the claim arises from the same basic facts as did  
4 Steinberg’s Securities Act claim.

5           “Under the doctrine of res judicata, or claim preclusion, ‘[a] final judgment on the  
6 merits of an action precludes the parties or their privies from relitigating issues that were or could  
7 have been raised in that action.’” *Moitie*, 452 U.S. at 398 (citations omitted); *Allen v.*  
8 *McCurry*, 449 U.S. 90, 94 (1980). To establish a res judicata bar against plaintiffs’ federal claim  
9 here, defendants must show: (1) *Steinberg* was a “judgment on the merits”; (2) plaintiffs are the  
10 same as, or in privity with Steinberg; and (3) plaintiffs’ federal claim is “based on the same  
11 transaction” as Steinberg’s claim. As discussed below, defendants do satisfy each element.

12           1. Judgment on the Merits

13           To show that the *Steinberg* Rule 23.1(b) dismissal was a final judgment on the  
14 merits, defendants cite New York preclusion law for the proposition that because demand futility  
15 is a substantive rather than procedural issue, a decision on futility is necessarily a final judgment  
16 on the merits. *See* Mot. at 6 (citing *Henik ex rel. LaBranche & Co. v. LaBranche*, 433 F. Supp.  
17 2d 372, 378–79 (S.D.N.Y. 2006)). Plaintiffs do not dispute that *Steinberg* was a “final decision  
18 on the merits.” Opp’n at 9 (arguing only that *Steinberg* did not involve the same claims).

19           Under federal preclusion law, the issue is not as clear-cut as defendants suggest.  
20 Defendants cite no controlling authority for the proposition that a dismissal for demand futility is  
21 always a final decision on the merits, and the Ninth Circuit has expressly left the question open.  
22 *See Arduini*, 774 F.3d at 629 n.4 (explaining a dismissal for failure to plead demand futility is  
23 final for purposes of issue preclusion, but stating “[w]e express no opinion on whether claim  
24 preclusion could apply in this case.”). This element thus demands further analysis.

25           In *Steinberg*, the court dismissed the complaint because it lacked sufficient factual  
26 allegations to excuse the pre-suit demand requirement. *Steinberg*, 2014 WL 3512848, at \*9.  
27 Although it appears no court has yet determined whether a Rule 23.1(b) dismissal constitutes a  
28

1 final decision on the merits as a matter of federal common law, other courts have addressed the  
2 state analogue in applying various state preclusion rules.

3 a. Circuit Court Opinions

4 The First Circuit in *Sonus, supra*, is the only federal appellate court to directly  
5 answer whether a Rule 23.1(b) dismissal constitutes a final decision on the merits under the claim  
6 preclusion doctrine. *Sonus*, 499 F.3d at 62. *Sonus* held that a decision on demand futility was a  
7 final judgment on the merits under issue preclusion, as discussed above, but not so under claim  
8 preclusion. *Id.* Although *Sonus* applied Massachusetts law, it answered unsettled claim and issue  
9 preclusion questions and thus examined the principles on a broader level. *Id.*

10 *Sonus* ultimately found that applying claim preclusion to a dismissal for failure to  
11 plead satisfaction of a precondition to suit is incompatible with the idea that failure to satisfy a  
12 precondition generally can be cured. *Id.* at 61–62 (“dismissal of a derivative suit for failure to  
13 plead demand or excuse is of course a type of dismissal for inadequate pleadings, [but] it is also a  
14 dismissal for failure to accomplish a precondition . . .”). *Sonus* based its conclusion on two  
15 Supreme Court precedents. *Id.* at 58, 62. In *Costello v. United States*, the Supreme Court  
16 explained dismissal for failure to satisfy a precondition to suit should not trigger claim preclusion  
17 if that precondition is satisfied between a first and second suit. 365 U.S. 265, 285–88 (1961). In  
18 *Semtek, supra*, the Supreme Court concluded a dismissal with prejudice will “ordinarily (though  
19 not always)” determine the res judicata question. 531 U.S. at 505. Simply put, the *Sonus* court’s  
20 holding turned on whether the demand futility issue was “curable.”

21 Although no other circuit court has examined whether a demand futility dismissal  
22 constitutes a final decision on the merits for res judicata purposes, several circuits have addressed  
23 the question in the context of a prior dismissal for failure to meet a precondition to suit. In these  
24 circumstances, federal appellate courts have uniformly held that claim preclusion should not  
25 attach. In *Singh v. Gonzales*, the Ninth Circuit reasoned that a prior court’s dismissal for failure  
26 to exhaust the administrative review process or to comply with *Lozada*’s procedural  
27 requirements<sup>3</sup> were not “final judgments on the merits.” 499 F.3d 969, 975 (9th Cir. 2007). In

28 <sup>3</sup> In *Matter of Lozada*, 19 I. & N. Dec. 637, 637 (BIA 1988), the Board of Immigration

1 *Horner v. Ferron*, the Circuit held that a dismissal for appellant’s failure to “ma[k]e a preliminary  
2 request of union officials to take action” was a “procedural ground which is capable of  
3 correction” and therefore res judicata would not prevent appellants from correcting the procedural  
4 mistake in a subsequent and independent action. 362 F.2d 224, 230 (9th Cir. 1966). In *Lake*  
5 *Lucerne Civic Ass’n Inc. v. Dolphin Stadium Corp*, the Eleventh Circuit observed “[i]n ordinary  
6 circumstances a second action on the same claim is not precluded by dismissal of a first action for  
7 prematurity or failure to satisfy a precondition to suit. No more need be done than await maturity,  
8 satisfy the precondition, or switch to a different substantive theory that does not depend upon the  
9 same precondition.” 878 F.2d 1360, 1366 n.7 (11th Cir. 1989) (citation omitted). Each court  
10 focused on the curability of the complaint’s defect between suits one and two.

11 b. District Court and State Court Decisions

12 District and state courts that have analyzed the claim preclusive effect of a  
13 dismissal for failure to plead demand futility have reached contradictory conclusions. For  
14 example, in *Kaplan v. Bennett*, 465 F. Supp. 555 (S.D.N.Y. 1979), a district court in New York  
15 ruled that a prior court’s dismissal was not final, but in *Henik, supra*, 433 F. Supp. 2d at 379–80,  
16 a court in the same district concluded a prior dismissal for failure to plead demand futility was a  
17 final decision on the merits under both issue and claim preclusion doctrines.

18 A recent Delaware state court decision has specifically analyzed *Steinberg’s*  
19 preclusive effect. See *City of Providence v. Dimon*, No. CV 9692-VCP, 2015 WL 4594150, \*6  
20 (Del. Ch. July 29, 2015). In *Providence*, the court held that the *Steinberg* Rule 23.1(b) dismissal  
21 was a final judgment on the merits for claim preclusion purposes. *Id.* The *Providence* court,  
22 however, applied only New York preclusion law to reach its conclusion. *Id.* (concluding “[t]his  
23 Court [i]s required to give [*Steinberg’s* judgment] the same force and effect as [it] would be  
24 afforded in New York courts under the New York law of preclusion.”) Because *Steinberg* was a

---

25  
26 Appeals held that to perfect an ineffective assistance of counsel claim, the immigrant must first  
27 (1) file a motion to reopen, (2) file an affidavit detailing the agreement his counsel allegedly  
28 violated, (3) inform the counsel what he did wrong and give him a chance to respond, and  
(4) explain whether a complaint has been filed with the appropriate authorities regarding  
counsel’s ethical or legal responsibilities, and if not, explain why not. See *id.* at 639. See also  
*Castillo-Perez v. I.N.S.*, 212 F.3d 518, 525 (9th Cir. 2000) (describing *Lozada’s* holding).

1 federal court judgment based on federal-question jurisdiction, federal common law rules  
2 determine *Steinberg*'s preclusive effect in this court. The *Providence* holding neither  
3 acknowledged *Steinberg* was a federal case nor distinguished between *Steinberg*'s federal and  
4 state law judgments. *Providence*, therefore, does not inform this court's decision here more than  
5 any other nonbinding state law case. Additionally, because *Providence* applied New York  
6 preclusion law to assess whether *Steinberg*'s dismissal was a final decision on the merits, that  
7 opinion does not provide a basis for issue preclusion, preventing this court from analyzing the  
8 same question under the federal common law. New York preclusion rules apply a different  
9 framework to answer the question.

10 Other courts assessing whether a dismissal based on demand futility is a final  
11 decision on the merits have focused on whether the failure to plead futility was a fatal error rather  
12 than a curable pleading defect. *See, e.g., In re Bed Bath & Beyond Deriv. Litig.*, No. CIV.A. 06-  
13 5107(JAP), 2007 WL 4165389, at \*7 (D.N.J. Nov. 19, 2007) (applying res judicata after declaring  
14 demand futility dismissal a "final decision on the merits" in large part because the cover page of  
15 court's dismissal decision was marked "Final Disposition."); *Shearer v. Adams (Shearer II)*, No.  
16 3:11-00099, 2012 WL 1076299, at \*6 (M.D. Tenn. Mar. 29, 2012). In *Shearer II*, the court  
17 focused on the finality of the prior court's dismissal for failure to plead demand futility, noting  
18 that the prior dismissal was with prejudice and that the plaintiff did not contest the decision's  
19 finality at that time. *Shearer II*, 2012 WL 1076299, at \*6. Specifically, the court explained, "if  
20 there was any question as to whether [the presiding judge] intended to bar subsequent suit based  
21 upon the same facts even in light of a new demand, that question was answered when he declined  
22 to sign [p]laintiff's proposed order, which would allow [p]laintiff to re-file, and reaffirmed that  
23 the dismissal was with prejudice." *Id.*

24 At least one court, however, has rejected a focus on curability. *See Bazata v. Nat'l*  
25 *Ins. Co. of Wash.*, 400 A.2d 313, 314 (D.C. 1979). In *Bazata*, the plaintiff's first derivative suit  
26 was dismissed for failure to make a demand, but the plaintiff later made a demand and refiled.  
27 *Id.* The *Bazata* trial court held that the prior dismissal triggered res judicata because it relied on  
28 a substantive analysis as to whether the directors breached their duties: The plaintiff's subsequent

1 “curing” of the demand defect did not alter this conclusion. *Id.* at 315–16; *but see Ex Parte*  
2 *Capstone Dev. Corp.*, 779 So.2d 1216, 1219 (Ala. 2000) (expressly rejecting *Bazata* and  
3 declining to apply *res judicata* in the same situation).

4 In sum, the law on whether a prior dismissal based on demand futility precludes a  
5 later action based on the same underlying claims is unsettled.

6 c. Discussion

7 Given the absence of controlling authority answering the question whether the  
8 *Steinberg* dismissal for failure to plead demand futility is a final decision on the merits for  
9 purposes of claim preclusion, this court must fashion a rule drawn from persuasive principles in  
10 other cases. The most consistent and persuasive rule recognizes that whether a prior court’s Rule  
11 23.1(b) dismissal constitutes a final judgment on the merits depends on whether that court treated  
12 the error in not pleading demand futility as fatal rather than curable. In applying this “fatal versus  
13 curable” rule here, the court notes an important distinction between a shareholder’s omission of  
14 sufficient detail to assess if demand was futile, a curable defect, and a shareholder’s affirmative  
15 pleading of facts that show demand was not futile, a defect more likely to be fatal. The latter  
16 would more likely prompt a dismissal that is final for purposes of claim preclusion.

17 This rule squares with the two Supreme Court precedents on which the First  
18 Circuit relied on *Sonus*. *See Costello*, 365 U.S. at 285–88 (1961) (dismissal for failure to satisfy a  
19 precondition to suit should not trigger claim preclusion if that precondition can be satisfied before  
20 bringing the second suit); *Semtek*, 531 U.S. at 505 (whether dismissal is with or without prejudice  
21 will ordinarily determine the *res judicata* question). The rule also is consistent with the rationale  
22 articulated in *Singh*, 499 F.3d at 974–75, *Horner*, 362 F.2d at 230, and *Lake Lucerne*, 878 F.2d at  
23 1360 n.7. In each of these cases, the court focused on whether the prior dismissal was permanent,  
24 and was hesitant to apply claim preclusion where a plaintiff could cure the defect and then  
25 properly re-file the claim.

26 Whether *Steinberg* is preclusive of plaintiffs’ federal claim depends on whether the  
27 *Steinberg* dismissal was final. The *Steinberg* court did not address finality: It did not expressly  
28 say whether the dismissal was with prejudice or whether the pleading defect was curable. But

1 without a contrary directive, the court assumes the dismissal was with prejudice. *See* Fed. R. Civ.  
2 P. 41(b) (“Unless the dismissal order states otherwise, a dismissal under this subdivision . . .  
3 operates as an adjudication on the merits.”); *see also* *Martin v. Beck*, No. 2:14-CV-2956 KJM  
4 KJN, 2015 WL 502946, at \*2 (E.D. Cal. Feb. 5, 2015) (“[G]enerally, ‘a dismissal for failure to  
5 state a claim under Rule 12(b)(6) is presumed . . . to be rendered with prejudice.’”) (quoting  
6 *McLean v. United States*, 566 F.3d 391, 396 (4th Cir. 2009)); *Isis Pharm., Inc. v. Santaris*  
7 *Pharma A/S Corp.*, No. 3:11-CV-2214-GPC-KSC, 2014 WL 4793029, at \*2 (S.D. Cal. Sept. 25,  
8 2014); *Fernandez-Montes v. Allied Pilots Ass’n*, 987 F.2d 278 n.8 (5th Cir. 1993) (“it is well  
9 established that a dismissal is presumed to be with prejudice unless the order explicitly states  
10 otherwise”).

11           Also, the nature of the opinion and its language indicates that the dismissal for  
12 failure to plead demand futility was permanent and final. As noted above, the *Steinberg* court  
13 analyzed the substance of the demand futility issue by assessing the likelihood of success of  
14 *Steinberg’s* underlying claims. *See Steinberg*, 2014 WL 3512848, at \*3–5. After analyzing each  
15 claim independently, the court concluded that even if *Steinberg* could prove all allegations, he  
16 could not show demand on the defendant board was futile with respect to any claim; the court  
17 granted the defendants’ motion to dismiss the complaint, directing the clerk to enter judgment  
18 “and close this case.” *Id.* at \*5. The court did not mention the potential for amendment or  
19 curability, nor did *Steinberg* ask. *See generally id.* In short, *Steinberg* treated the pleading  
20 deficiency as a fatal error that could not be cured.

21           The persuasive opinions reviewed above, and res judicata principles generally,  
22 compel the conclusion that *Steinberg* was a final decision on the merits. This conclusion is a  
23 narrow one; the court does not determine that dismissal for failure to plead demand futility is  
24 always a final decision on the merits for res judicata purposes. Rather, there are many  
25 conceivable scenarios in which a dismissal for failure to plead demand futility may not be a final  
26 determination. In this case, however, defendants have satisfied the first element of res judicata.

27 /////

28 /////

1                   2. Same Parties

2                   To successfully argue that *Steinberg* precludes plaintiffs from bringing their  
3 federal claim, defendants must also show the parties in the *Steinberg* suit are the same parties or  
4 in privity with the parties in this action. Plaintiffs do not dispute that they are in privity with  
5 *Steinberg*. See Opp’n at 9 (arguing only that *Steinberg* did not involve the same claims).

6                   As a matter of law, plaintiffs and *Steinberg* are in privity. *Arduini*, 774 F.3d at 633  
7 (“the majority of courts that have addressed this issue have held that shareholders asserting  
8 derivative suits are in privity”); *Sonus*, 499 F.3d at 64 (“the prevailing rule [is] that the  
9 shareholder in a derivative suit represents the corporation,” and “if the shareholder can sue on the  
10 corporation’s behalf, it follows that the corporation is bound by the results of the suit in  
11 subsequent litigation, even if different shareholders prosecute the suits”) (citations omitted); see  
12 also *Ross v. Bernhard*, 396 U. S. 531, 538 (1970); *Goldman v. Northrop Corp.*, 603 F.2d 106,  
13 109 (9th Cir. 1979).

14                  The defendants in both suits also are in privity despite the slight variation in the set  
15 of directors the respective plaintiffs chose to name in the two suits. Altering the mix of director-  
16 defendants does not bar claim preclusion unless defendants named only in the second suit either  
17 were inadequately represented in the prior suit or were unknown or unavailable at the time of the  
18 prior suit. See *Sturgell*, 553 U.S. at 893–84 (parties who share same interests were adequately  
19 represented in previous litigation are in privity with parties in previous litigation and their claims  
20 are subject to res judicata); *In re Gottheiner*, 703 F.2d 1136, 1140 (9th Cir. 1983) (even when  
21 parties are not identical, privity exists if there is “sufficient commonality of interest” between the  
22 parties) (citation omitted); *Central Hudson Gas & Elec. Corp. v. Empresa Naviera Santa S.A.*, 56  
23 F.3d 359, 367–68 (2d Cir. 1995); *Gambocz v. Yelencsics*, 468 F.2d 837, 841 (3d Cir. 1972).

24                  Each defendant named here was known and available when *Steinberg* filed suit.  
25 Plaintiffs raise no contrary arguments. That the two suits were filed within one month of each  
26 other reinforces this conclusion. See Original Compl., ECF No. 1 (filed March 2014); *Steinberg*  
27 Compl. (filed February 2014). The parties in this case are in privity with the parties in *Steinberg*,  
28 which satisfies the second res judicata element.

1                   3. Same Claims

2                   Finally, to successfully argue that *Steinberg* precludes plaintiffs from bringing  
3 their federal claim here, defendants must show plaintiffs' claim is either the same claim or a claim  
4 derived from the same underlying facts as *Steinberg's* claim. Plaintiffs argue their federal claim  
5 is not the same claim because it varies significantly from *Steinberg's*.

6                   Typically, res judicata principles require that once a claim is brought to a final  
7 conclusion, all other claims "aris[ing] out of the same transactional nucleus of facts" are barred.  
8 *Frank v. United Airlines, Inc.*, 216 F.3d 845, 851 (9th Cir. 2000) (citation omitted). This doctrine  
9 is broad and does "not only bar[] the relitigation of previously litigated claims" but also those  
10 "claims that are closely related to the claims unsuccessfully litigated in a prior case."  
11 *See Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2340 (2016) (citing *Moitie*, 452 U.S. at  
12 398; *Montana v. United States*, 440 U.S. 147, 153 (1979)); *see also Costantini v. Trans World*  
13 *Airlines*, 681 F.2d 1199, 1201 (9th Cir 1982) ("the doctrine of res judicata [] bars all grounds for  
14 recovery which could have been asserted, whether they were or not, in a prior suit between the  
15 same parties") (internal citation and quotation marks omitted). Thus, unlike issue preclusion,  
16 claim preclusion focuses on what could have been litigated in the prior suit, not what was actually  
17 litigated.

18                   The rationale for precluding claims that parties could have brought, but did not,  
19 mirrors the rationale underlying issue preclusion: A party who has had a full and fair opportunity  
20 to litigate a claim should not be allowed to try again. *See Kremer v. Chemical Const. Corp.*, 456  
21 U.S. 461, 481 n.22 (1982) ("While our previous expressions of the requirement of a full and fair  
22 opportunity to litigate have been in the context of collateral estoppel or issue preclusion, it is clear  
23 from what follows that invocation of res judicata or claim preclusion is subject to the same  
24 limitation."). Determining what claim could have been litigated in the prior suit involves  
25 evaluating what underlying facts generated each claim. *Woman's Health*, 136 S. Ct. at 2340;  
26 *Helper*, 224 F. 3d at 1128. Claims in the second suit are barred if they are based on "any part of  
27 the transaction, or series of connected transactions, out of which the [prior] action arose."  
28 *Woman's Health*, 136 S. Ct. at 2340; *see also Helper*, 224 F. 3d at 1128 (explaining res judicata

1 bars subsequent claims that “arise from the same transactional nucleus of facts”) (citation  
2 omitted).

3 a. Parties’ Arguments

4 Plaintiffs do not dispute that their federal claim and Steinberg’s federal claim rely,  
5 in part, on allegations that JPMorgan’s 2011 and 2012 proxy statements contained false or  
6 misleading statements regarding effective oversight of risk management. Opp’n at 12. Instead,  
7 plaintiffs cite multiple ways in which they say their claim materially differs from Steinberg’s and  
8 argue “[b]ecause of the material differences . . . neither res judicata nor collateral estoppel is  
9 applicable.” *Id.* at 13. Plaintiffs maintain that, unlike their claim, Steinberg’s claim mentioned  
10 neither director independence nor shareholder proposals regarding Dimon’s role as chairman as  
11 grounds for the proxy statements’ falsity. *Id.* at 12 (citing Steinberg Compl. ¶¶ 71–95). Plaintiffs  
12 also emphasize the difference in the relief they seek, namely that Steinberg sought monetary  
13 damages, while plaintiffs here renounce monetary damages. *Id.* at 13. Plaintiffs add that the  
14 *Steinberg* complaint differs materially from theirs because Steinberg’s complaint named  
15 defendants that plaintiffs did not name: Braunstein, Cavanaugh, Cote, Drew and Gray; and  
16 Steinberg’s complaint did not name three defendants plaintiffs named: Flynn, Harrison and Lipp.  
17 *Id.* at 9. Finally, plaintiffs detail how Steinberg’s complaint did not include the extensive  
18 allegations or identify defendants’ RMBS strategy in California as the fundamental basis for any  
19 of their claims. *Id.*

20 Defendants maintain that plaintiffs miss the mark because claim preclusion applies  
21 irrespective of these alleged differences “as long as the same claims were or could have been  
22 raised in the prior action.” Reply at 8. Alternatively, defendants argue, plaintiffs’ argument is  
23 factually incorrect because the federal claims in both cases are virtually identical. *Id.*

24 b. Discussion

25 Although the differences between Steinberg’s federal claim and the federal claim  
26 here are relevant to the court’s issue preclusion analysis, they lack force when it comes to claim  
27 preclusion. Contrary to plaintiffs’ assertions, whether claim preclusion applies does not depend  
28 on whether Steinberg’s complaint raised the exact facts, theories of recovery, or even prayers for

1 relief as plaintiffs do here. *Woman's Health*, 136 S. Ct. at 2340; *Constantini v. Trans World*  
2 *Airlines*, 681 F.2d 1201 n.2 (9th Cir. 1982) (“[a]ppellant has apparently confused res judicata  
3 with the related but distinct doctrine of collateral estoppel, which does apply only when ‘an issue  
4 is actually and necessarily determined’”) (citation omitted); *Saylor v. Lindsley*, 391 F.2d 965, 969  
5 n.6 (2d Cir. 1968) (“the allegations in both suits clearly pertain to the same disputed transactions  
6 and arise out of the same operative facts . . . a new theory does not create a new cause of action.”)  
7 (citations omitted).

8           Rather, the claim preclusion analysis turns on whether the federal claims in both  
9 suits arise from the same basic events. Plaintiffs cite JPMorgan’s 2011 and 2012 proxy  
10 statements as grounds for their federal claim; Steinberg relied on the very same documents in  
11 bringing her federal claim. *Compare* Steinberg Compl. ¶¶ 273–84, *with* FAC ¶¶ 377–95.  
12 Specifically, plaintiffs here allege defendants Dimon, Bell, Bowles, Burke, Cote, Crown, Futter,  
13 Gray, Jackson, Novak, Raymond and Weldon “issued, caused to be issued, and participated in the  
14 issuance of materially false and misleading written statements and material omissions to  
15 shareholders that were contained in the Company’s 2011 and 2012 Proxy Statements.” FAC ¶  
16 378. Steinberg’s claim mirrors this language but adds one more year: “Defendants Dimon,  
17 Bowles, Burke, Cote, Crown, Futter, Jackson, Raymond and Weldon issued, caused to be issued,  
18 and participated in the issuance of materially false and misleading written statements to  
19 shareholders that were contained in the Company’s Proxy Statements issued on April 7, 2011,  
20 April 4, 2012, and April 10, 2013.” Steinberg Compl. ¶ 277.

21           The federal claim in each case derives from the same underlying facts. Both  
22 claims are based, in large part, on the same 2011 and 2012 proxy statements. That Steinberg’s  
23 complaint references a 2013 proxy statement as well does not change the complaints’ sufficient  
24 overlap for claim preclusion purposes. Both claims allege misstatements regarding the  
25 independence of the JPMorgan director nominees, the shareholder proposal to divest Dimon of  
26 his role as chairman, defendants’ misrepresentation of information about the underlying mortgage  
27 loans in securities filings, and the omission of material information regarding JPMorgan’s true  
28

1 financial condition and risk management structure. *Compare* Steinberg Compl. ¶¶ 273–84, with  
2 FAC ¶¶ 377–95. Plaintiffs’ federal claim could have brought in *Steinberg*.

3 To the extent plaintiffs argued claim preclusion does not apply because they have  
4 alleged different and better theories of recovery, and more evidence and greater evidentiary  
5 support for their claims than Steinberg did, the Supreme Court has expressly rejected that  
6 argument: “[The argument that] petitioners now have better evidence than they did at the time of  
7 the first case . . . is contrary to a cardinal rule of res judicata, namely, that a plaintiff who loses in  
8 a first case cannot later bring the same case simply because it has now gathered better evidence.  
9 Claim preclusion, does not contain a ‘better evidence’ exception.” *Woman’s Health*, 136 S. Ct. at  
10 2335. Plaintiffs’ argument that their alternative set of director defendants prevents the application  
11 of claim preclusion fails as well because the substance of plaintiffs’ claim derives from the same  
12 facts as Steinberg’s. To conclude otherwise would frustrate res judicata’s purpose.

13 Defendants have satisfied res judicata’s final element: Plaintiffs could have raised  
14 their federal claim in *Steinberg* because the same facts form the basis of the claim in each suit.  
15 Claim preclusion bars plaintiffs’ Securities Act claim as a matter of law.

16 E. Conclusion Regarding Preclusion

17 Because plaintiffs’ federal claim is precluded as a matter of law, the court  
18 GRANTS defendants’ motion to dismiss this claim, with prejudice. As noted above, the court  
19 therefore does not have pendent personal jurisdiction over defendants based on plaintiffs’ state  
20 law claims. The court might still maintain personal jurisdiction over defendants if they have  
21 sufficient contacts with California. The court dismissed plaintiff’s original complaint in part  
22 based on inadequate California-specific contacts to trigger specific personal jurisdiction over  
23 defendants. The court now assesses whether plaintiffs’ amended complaint has overcome this  
24 previous shortcoming.

25 V. PERSONAL JURISDICTION

26 Defendants all are citizens of states other than California and they resist plaintiffs’  
27 efforts to hale them into this court. When, as here, defendants contend the court lacks personal  
28 jurisdiction over them, the burden lies with the plaintiffs to allege “facts that if true would support

1 jurisdiction” over each defendant. *Ballard v. Savage*, 65 F.3d 1495, 1498 (9th Cir. 1995) citation  
2 omitted). Personal jurisdiction standards differ from state to state; federal courts apply the test of  
3 the state in which they sit. *Schwarzenegger*, 374 F.3d at 800 (citation omitted). California’s  
4 personal jurisdiction test, which mirrors federal due process requirements, mandates “minimum  
5 contacts” between the defendant and California such that the court’s exercise of jurisdiction “does  
6 not offend traditional notions of fair play and substantial justice.” *Int’l Shoe Co. v. State of*  
7 *Wash., Office of Unemployment Comp. & Placement*, 326 U.S. 310, 316 (1945) (citation  
8 omitted); *Schwarzenegger*, 374 F.3d at 800–01. See also Cal. Code. Civ. P. § 410.10 (“A court of  
9 this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state  
10 or of the United States.”). Plaintiffs can establish jurisdiction in California through two avenues:  
11 General personal jurisdiction or specific personal jurisdiction. *Helicopteros Nacionales de*  
12 *Colombia S.A. v. Hall*, 466 U.S. 408, 414 nn.8–9 (1984). Plaintiffs here rely on only the latter.  
13 Opp’n at 13–20.

14 California’s specific personal jurisdiction test requires plaintiffs to show: (1) Each  
15 defendant purposefully directed his or her activities to California or purposefully availed him or  
16 herself of California’s forum; and (2) plaintiffs’ claims arise from or relate to those activities.  
17 *Schwarzenegger*, 374 F.3d at 802. If plaintiff makes this showing, then defendants must show  
18 that the court’s exercising personal jurisdiction over them would be unreasonable or unfair. *Id.*

19 A. Purposeful Availment Generally

20 Plaintiffs must first show defendants purposefully directed activities to, or availed  
21 themselves of, California. *Id.* Plaintiffs need not prove defendants ever stepped foot in  
22 California. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985). Rather, plaintiffs may  
23 show purposeful availment if defendants (1) committed an intentional act (2) aimed at California  
24 (3) that they knew would likely cause harm in California. *Schwarzenegger*, 374 F.3d at 803. To  
25 be an intentional act, a defendant must have intended to perform the physical act and not just  
26 intended its result. *Id.* at 806 (citing Restatement (Second) of Torts § 2 (1964)). Because due  
27 process requires defendants’ connection with California to be such that they could “reasonably  
28 anticipate being haled into court []here,” *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S.

1 286, 297 (1980), plaintiffs must show “something more” than the mere foreseeability that  
2 defendants’ acts may harm California. *Schwarzenegger*, 374 F.3d at 805 (citing *Calder v. Jones*,  
3 465 U.S. 783, 789 (1984)). This contextual inquiry depends on the nature of the wrongs plaintiffs  
4 allege. *Id.* at 807.

5 Here, because JPMorgan is incorporated elsewhere and principally located outside  
6 California, plaintiffs must show each defendant had sufficiently purposeful contact with  
7 California to warrant haling them into court here.

8 **B. Purposeful Availment in Shareholder Derivative Suits**

9 Derivative suits are tools for shareholders to protect a corporation from its  
10 directors and managers. *Rosenbloom v. Pyott*, 765 F.3d 1137, 1147 (9th Cir. 2014) (citations  
11 omitted). Although the shareholders are the named plaintiffs, the claims they bring belong to the  
12 corporation. *See id.*; *Kamen*, 500 U.S. at 101. JPMorgan is a Delaware corporation with its  
13 principal place of business in New York. FAC ¶ 23. To succeed on their derivative claims,  
14 plaintiffs seek to show defendants purposefully directed harm toward the corporation, meaning  
15 defendants directed harmful acts toward New York and Delaware. Yet to withstand a  
16 jurisdictional dismissal, plaintiffs must also sufficiently allege defendants directed harmful  
17 activities to California. The court previously has addressed this conundrum. Prior Order at 7–13.  
18 Finding no controlling authority that discerned a test for assessing specific personal jurisdiction in  
19 this scenario, the court looked to other courts’ handling of this question. *Id.* The parties have not  
20 asked the court to reconsider the law of the case, and no intervening authority justifies doing so.  
21 The court thus once again applies the same rule it articulated before.

22 The court’s prior order framed the limitations of specific personal jurisdiction  
23 when shareholders derivatively sue directors in a state where the corporation is neither  
24 incorporated nor principally located. In these scenarios, shareholders must plead other  
25 foundational facts to connect the defendants to the forum. *See* Prior Order at 13 (citing *Beene v.*  
26 *Beene*, No. C 11-6717 JSW, 2012 WL 3583021, at \*1, 6 (N.D. Cal. Aug. 20, 2012) and *Young v.*  
27 *Colgate-Palmolive Co.*, 790 F.2d 567, 570–71 (7th Cir. 1986)).  
28

1           For example, in *Greenspun*, the Ninth Circuit affirmed the presence of personal  
2 jurisdiction where the corporation held board meetings and developed real property in the forum  
3 state. *Greenspun v. Del E. Webb Corp.*, 634 F.2d 1204, 1206–08 (9th Cir. 1980). In *D’Addario*,  
4 a Virginia district court found the exercise of jurisdiction over a Florida corporation’s directors  
5 proper based in large part on their previous voluntary contacts with that very court. *D’Addario v.*  
6 *Geller*, 264 F. Supp. 2d 367, 381–82 (E.D. Va. 2003) (“defendants cannot reasonably assert  
7 unfair surprise at being sued in Virginia, particularly when they have voluntarily presented [the  
8 corporation’s] financial condition before this court in the salvage action.”). Then, in *Doltz*, a  
9 Pennsylvania district court found jurisdiction adhered to the directors of a Florida corporation  
10 because they wrote paychecks for Pennsylvania-based employees, talked to the Pennsylvania-  
11 based plaintiff about company issues frequently, regularly communicated with and visited the  
12 Pennsylvania office, and prequalified the company to bid on Pennsylvania jobs. *Doltz v. Harris*  
13 *& Assocs. Grooving, Inc.*, No. CIV.A.01-5458, 2002 WL 524185, at \*1–2 (E.D. Pa. Apr. 5,  
14 2002).

15           In *Openwave*, a California district court found jurisdiction proper when the  
16 defendants had no personal contact with California, but had conceived of and participated in a  
17 “plan or scheme” targeting California. *See Openwave Sys. Inc. v. Fuld*, No. C 08-5683 SI, 2009  
18 WL 1622164, at \*11–12 (N.D. Cal. June 6, 2009). *Openwave* is not a derivative case, but  
19 persuasively defines the outer limits of this court’s jurisdiction. *See In re Countrywide Fin. Corp.*  
20 *Mortgage-Backed Sec. Litig.*, 2012 WL 1322884, at \*9 (C.D. Cal. April 16, 2012)  
21 (“The *Openwave* decision pushes the boundaries of personal jurisdiction, but the *Openwave*  
22 plaintiff at least provided an allegation that the out-of-state defendants had specifically directed  
23 their actions to California.”).

24           In sum, these cases show that to sustain their derivative action here, plaintiffs must  
25 allege foundational facts proving each defendant had direct and purposeful contact with  
26 California. And if plaintiffs stake their jurisdiction claim on *Openwave*’s “plan or scheme”  
27 premise (rather than a physical presence in the forum) they must “clearly” and “substantially”  
28 allege that defendants targeted California. *See* Prior Order at 14. The court dismissed plaintiffs’

1 initial complaint because it did not meet this standard. *See id.* at 28–29. It did not allege  
2 defendants intentionally pursued more RMBS business in California than other states, or that  
3 defendants “pursued a strategy” to sell RMBS to California investors.

4 C. Discussion

5 In their amended complaint, plaintiffs provide more details about JPMorgan’s  
6 California-specific contacts and business. *See generally* FAC at 65–88. Plaintiffs do not aver  
7 that defendants ever stepped foot in California, arguing instead defendants were instrumental in  
8 enacting a plan that targeted California. Because plaintiffs stake personal jurisdiction on  
9 *Openwave*’s plan or scheme premise, they must “clearly” and “substantially” allege how  
10 defendants specifically targeted California to withstand dismissal. *See* Prior Order at 13–14.

11 Upon close review, as explained below, the court finds the amended complaint  
12 does not offer the link that was missing from plaintiffs’ prior complaint. Plaintiffs now allege  
13 that more than half of JPMorgan’s subprime loans underlying the RMBS issued between 2005  
14 through 2007 originated in California, *id.* ¶ 222, that JPMorgan purchased the defective loans  
15 primarily from California-based originators, *id.* ¶¶ 111, 194–227, and that California was  
16 particularly hard hit by the housing collapse that plaintiffs partially attribute to JPMorgan’s  
17 misconduct, *id.* ¶¶ 194, 198–200, 205, 207, 209, 247. Plaintiffs also allege JPMorgan’s Risk  
18 Policy Committee regularly provided defendants California-specific data, *id.* ¶¶ 239–52, and that  
19 each defendant knew the harm JPMorgan was causing to California but chose to pursue growth in  
20 its business here regardless, *id.* ¶¶ 194, 198–200, 205, 207, 209, 239–52. Plaintiffs characterize  
21 JPMorgan’s focus on California’s mortgage market as a key component of its unlawful RMBS  
22 program. *Id.* ¶¶ 194–238. These new allegations, plaintiffs contend, “are sufficient to exercise  
23 personal jurisdiction.” *Opp’n* at 23:12–13. But they are not, under the law as this court discerns  
24 it after much careful consideration.

25 Although plaintiffs detail JPMorgan’s impact in California, this impact, no matter  
26 how great, does not establish personal jurisdiction over any individual defendant. The sheer  
27 magnitude of JPMorgan’s California-based business, though significant, does not show any  
28 defendant targeted California. Plaintiffs do not mention, let alone argue against, the logical

1 conclusion that natural market forces, not defendants' purposeful business decisions, could  
2 explain California's consistently prominent presence in JPMorgan's business statistics and data  
3 reports. Specifically, as defendants argue, California's sizable population and the dynamism of  
4 California's real estate market undermine plaintiffs' purposeful direction argument: These factors  
5 explain how California could have more of JPMorgan's RMBS business than any other state  
6 without any director having pursued a conscious strategy. *See* Mot. at 17. To accept plaintiffs'  
7 argument, the court would have to infer that because the individual defendants knew JPMorgan  
8 did substantial RMBS business in California, JPMorgan logically was harmed in California, and  
9 defendants in knowing as much purposefully directed their actions here. *See* Opp'n at 23. But  
10 knowledge does not equate to intent or purposeful direction. The complaint must plead more than  
11 the passive receipt of information to establish defendants purposefully directed activity towards  
12 California. *See* Prior Order at 16. The amended complaint, including its exhibits, does not  
13 suffice.

14           Plaintiffs' new allegations do not show defendants consciously decided to package  
15 more mortgage loans here than in other states, or that any defendant specifically discussed,  
16 proposed or approved a California-focused policy. Although plaintiffs add a bare allegation that  
17 defendants "targeted" California, FAC ¶ 194, without factual support this statement is an  
18 unsupported legal conclusion. *Papasan v. Allain*, 478 U.S. 265, 286 (1986) (court need not  
19 accept truth of "a legal conclusion couched as a factual allegation," nor an allegation that  
20 contradicts material attached to or incorporated by reference into complaint) (citation omitted).  
21 Plaintiffs' opposition brief also proclaims defendants targeted California despite knowing of  
22 problems in the RMBS program and the risks it posed; but they cite no supporting allegations and  
23 so at this point the court concludes they are unable to do so. *See* Opp'n at 23:10–12.

24           Many of plaintiffs' exhibits incorporated into the complaint do not discuss  
25 California. *See* Exs. D, F, K, M, N, O, Q & R. Of the board documents that do reference  
26 California, several relate to the subprime market or real estate market generally; they do not relate  
27 to the RMBS activity on which plaintiffs stake their claims. *See* ECF Nos. 122-4 at 36–38 (Ex.  
28 L), 122-5 at 9–10 (Ex. P) & 122 -7 at 42–50 (Ex. V) (depicting weakening real estate markets in

1 many states and regions, including California; ECF Nos. 122-7 at 16–27 (Ex. U), 122-8 at 41–49  
2 (Ex. Y) & 122-8 at 65–75 (Ex. Z) (all displaying graphs and price increases for the housing  
3 market across various regions).

4 Other exhibits address only JPMorgan’s home mortgage business: These exhibits  
5 not only appear irrelevant to an RMBS-focused lawsuit, but also show a well-diversified, as  
6 opposed to California-focused, distribution of outstanding real estate loans. *See* ECF No. 122-2  
7 at 69 (Ex. H) (“the geographic distribution of outstanding consumer real estate loans is well  
8 diversified”); ECF No. 122-3 at 72 (Ex. I) (same).

9 Of the exhibits that reference RMBS activity, not one isolates California. Rather,  
10 they show general trends and conditions in multiple states. *See, e.g.*, FAC ¶¶ 254, 261 (citing  
11 Exhibit U, showing trends in California plus nine other states, and listing California second of ten  
12 states affected by sub-prime mortgages); *id.* ¶ 259 (citing Exhibit X, which explains “market  
13 influences on subprime mortgage performance and highlights California, New York, and  
14 Florida”); *Id.* ¶ 260 (citing Exhibit Y, showing home mortgage price appreciation across four  
15 markets, Los Angeles being the only one in California); *id.* ¶ 262 (citing Exhibit Z pages 70–71  
16 and 76, showing “house price appreciation trends” in southern California, the Midwest and the  
17 Northeast); *see also* FAC ¶¶ 46–47, 250, 257–58 (citing Exhibit L, showing signs of weakening  
18 in “many regions” including “Massachusetts, California, portions of the Midwest among others,”  
19 and Exhibits P, V, W, each showing “weaknesses in Massachusetts, California among others”  
20 plus “Michigan, Ohio, and other Midwest states”).

21 Plaintiffs might establish jurisdiction by showing defendants targeted a defined  
22 group of states, including California. But plaintiffs’ allegations, taken together, depict ever-  
23 changing trends and regions and do not show purposeful targeting of California alone, or a group  
24 of states that includes California. Plaintiffs have not met their jurisdictional burden.

#### 25 D. Conclusion

26 Plaintiffs do not sufficiently allege facts showing defendants purposefully directed  
27 their activities towards California, either individually or as part of a scheme. Plaintiffs’ broad  
28 jurisdictional allegations overlook the clarity this court said was needed. Because plaintiffs have

1 not shown defendants purposefully availed themselves of California, they cannot hale defendants  
2 into this court. In the interest of justice, however, the court will transfer plaintiffs’ state claims to  
3 the Southern District of New York, rather than dismissing these claims outright. At hearing,  
4 plaintiffs confirmed their preference for transfer over dismissal, if it comes to that.

5 VI. VENUE TRANSFER

6 Defendants seek transfer of this case under 28 U.S.C. § 1404(a)<sup>5</sup> or § 1406(a).<sup>6</sup>  
7 Mot. at 44–49. Because the court lacks jurisdiction over defendants, transfer is proper only under  
8 § 1406(a). *Goldlawr, Inc. v. Heiman*, 369 U.S. 463, 466 (1962) (“The language of s[ection]  
9 1406(a) is amply broad enough to authorize the transfer of cases, however wrong the plaintiff  
10 may have been in filing his case as to venue, whether the court in which it was filed had personal  
11 jurisdiction over the defendants or not.”).

12 Rather than dismiss the remaining state law claims based on defendants’  
13 insufficient contacts with California, the court elects to transfer these claims to the Southern  
14 District of New York where venue and jurisdiction are proper. *See* 28 U.S.C. § 1401. The court  
15 thus need not analyze the convenience of litigating the case here as compared to New York. *See*  
16 *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 265–66 (1981) (“there is ordinarily a strong  
17 presumption in favor of the plaintiff’s choice of forum, which may be overcome only when the  
18 private and public interest factors clearly point towards trial in the alternative forum.”)

19 The court therefore GRANTS defendants’ alternative motion to transfer plaintiffs’  
20 remaining claims to the Southern District of New York.

---

21  
22  
23  
24  
25 <sup>5</sup> 28 U.S.C. § 1404(a) provides, “[f]or the convenience of parties and witnesses, in the  
26 interest of justice, a district court may transfer any civil action to any other district or division  
where it might have been brought or to any district or division to which all parties have  
consented.”

27 <sup>6</sup> 28 U.S.C. § 1406(a) provides, “[t]he district court of a district in which is filed a case  
28 laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice,  
transfer such case to any district or division in which it could have been brought.”

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

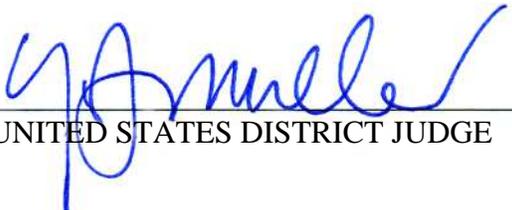
VII. CONCLUSION

The court GRANTS defendants' motion to dismiss in part as follows:

- (1) The court DISMISSES with prejudice plaintiffs' fourth claim, alleging violations of section 14(a) of the federal Securities Act, as barred by res judicata;
- (2) The court does not have specific personal jurisdiction over defendants as to plaintiffs' first, second and third state law claims and accordingly TRANSFERS them to the Southern District of New York under 28 U.S.C. § 1406(a); and
- (3) The court DENIES as moot the remainder of defendants' motion to dismiss.

This resolves ECF No. 123.

DATED: June 30, 2017.

  
UNITED STATES DISTRICT JUDGE