Wietschner v Dimon

2015 NY Slip Op 31553(U)

August 14, 2015

Supreme Court, New York County

Docket Number: 650079/14

Judge: Marcy S. Friedman

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 60

- X

SAM WIETSCHNER, derivatively on behalf of JPMORGAN CHASE & CO.,

Index No. 650079/14
Mot. Seq. 001 & 002

Plaintiff,

- against -

JAMES DIMON, LABAN P. JACKSON, JR., JAMES C. CROWN, WILLIAM C. WELDON, CRANDALL C. BOWLES, JAMES A. BELL, STEPHEN B. BURKE, LEE R. RAYMOND, TIMOTHY P. FLYNN, DAVID M. COTE, ELLEN V. FUTTER, and DAVID C. NOVAK,

Defendants.

- and -

JPMORGAN CHASE & CO.,

Nominal Defendant.

- X

MARCY FRIEDMAN, J.:

This shareholder derivative action was brought in the aftermath of the Bernard Madoff Ponzi scheme. Plaintiff Sam Wietschner sues defendant members of the board of directors of nominal defendant JPMorgan Chase & Co. (JPMorgan or the Company). Plaintiff alleges that the board failed to ensure that the Company maintained an adequate Anti-Money Laundering (AML) program and to report suspicious activity in the bank account through which Madoff passed massive amounts of stolen funds. Defendants move to dismiss the action, pursuant to CPLR 3211 (a) (7), on the ground that plaintiff failed to make a pre-suit demand upon the board to commence an action on behalf of the Company, and now fails to allege particularized facts excusing a demand. Defendants had also moved, in the alternative, to stay this action pending

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determination of two shareholder derivative actions brought in federal court, also alleging that the board failed to ensure that the Company maintained an adequate AML program and that damages were sustained in connection with the Madoff bank account as a result. Since the filing of the motion, the federal court has dismissed the actions, and defendants now seek dismissal of this action on the grounds of collateral estoppel and res judicata.[1] By separate motion, plaintiff seeks leave, pursuant to CPLR 3025 (b), to file a second amended complaint.

Background

The relevant facts, as alleged in the first amended complaint are as follows: Nominal defendant JPMorgan is a financial holding company incorporated under Delaware law. JPMorgan owns and controls JPMorgan Chase Bank, N.A. (Chase Bank). (Am Compl., ¶ 11.) The individual defendants are nine of the eleven members of the board of directors at the time the complaint was filed, and three former directors. (Id., ¶ 1.)[2] It is undisputed that all of the named current directors, except defendant Dimon, are non-management directors.[3] Bernard L. Madoff Investment Services was a corporation that purported to operate an investment advisor business, a brokerage business, and a proprietary trading business. (Id., ¶ 28.) Madoff's investment advisor business used Chase Bank for its banking from 1986 through 2008. From

[1] The court received supplemental briefing on this issue.

[2] The amended complaint alleges that JPMorgan had ten directors at the time the complaint was filed. Defendants state, and plaintiff does not dispute, that there were in fact 11 members of the board at that time. (Defs.' Memo. In Supp. Of Motion To Dismiss at 2.)

[3] The positions of the defendant directors are or were as follows: (1) Dimon, JPMorgan's chief executive officer, president and chairman of the JPMorgan board since July 2004, and a director until mid-2006; (2) Laban P. Jackson, Jr., a director since 2004; (3) Crandall C. Bowles, a director since 2006; (4) James A. Bell, a director since 2011; (5) James S. Crown, a director of JPMorgan Chase and Chase Bank since 1991; (6) William C. Weldon, a director of JPMorgan Chase and Chase Bank since 2005; (7) Stephen B. Burke, a director since 2003; (8) Lee R. Raymond, a director since 1987; (9) Timothy P. Flynn, a director since 2012; (10) David M. Cote, a director from 2007 until his resignation in July 2013; (11) Ellen V. Futter, a director from 2001 until her resignation in July 2013; and (12) David C. Novak, a director during the relevant period, and whose term expired on May 15, 2012. (Id., ¶¶ 12-23.)

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1986 on, all of the money that Madoff allegedly stole from his customers passed through a "703 Account" for the investment advisor business. (Id., ¶ 29.)

As further alleged in the first amended complaint, throughout the 703 Account's existence at Chase Bank, Chase Bank did not comply with the requirements of the Bank Secrecy Act (31 USC § 5311 et seq.) (BSA) for maintenance of an adequate AML program. (Id., ¶¶ 30-31.) Moreover, in the four years following the exposure of the Madoff fraud in December 2008, JPMorgan "took no material corrective steps to bring its AML program into compliance with the BSA." (Id., ¶ 54.)

Prior to the end of 2012, the Office of the Comptroller of the Currency (OCC) examined the Company's AML program and, in a nonpublic communication, informed the Company's management and directors that its program was inadequate. (Id., ¶ 59.) On January 14, 2013, the OCC issued a Cease and Desist Order (2013 OCC Consent Order) because the Company "had not taken steps to make substantial progress to establish a BSA compliant AML program." (Id., ¶ 62 [emphasis in original].) Under the terms of this Consent Order, "the Bank, by and through its duly elected and acting Boards of Directors," committed to "adopt and implement a compliance program that adequately covers the required BSA/AML program elements due to an inadequate system of internal controls." (Id., ¶ 66.) The 2013 OCC Consent Order required establishment of an AML compliance committee consisting of at least three directors to oversee implementation of the steps detailed in the Order. (Id., ¶ 74.) As the informal enforcement efforts of the Federal Reserve (which was also involved in the matter) "had not elicited a significant response from the Company," on January 14, 2013, the Federal Reserve also issued a Cease and Desist/Consent Order adopting the findings of the 2013 OCC Consent Order. (Id., ¶ 71.)

As the Company had not made "substantial progress in implementing corrective steps to establish" an adequate AML program as required by the 2013 OCC and Federal Reserve Consent Orders (id., ¶ 79 [emphasis in original]), on January 7, 2014, the OCC issued another Cease and Desist Order (2014 OCC Consent Order) "in which the OCC found identical systemic internal control deficiencies as had been found . . . in the January 2013 Consent Order." (Id., ¶ 81 [emphasis in original].) On that same day, the Treasury Department imposed money penalties to force the Company to implement adequate internal controls, and the OCC imposed a $350 million penalty. (Id., ¶¶ 83-84.) In addition, the Federal Reserve brought the matter to the attention of Treasury Department's "Financial Crimes Enforcement Network," which imposed a $461 million penalty for lack of adequate internal controls required by the BSA. (Id., ¶¶ 85-86.) The Department of Justice filed criminal charges against the Company for two felony counts for violation of the BSA. (Id., ¶ 87.) According to the first amended complaint, prosecution was deferred for two years in return for the Company's admission that its policy makers had willfully failed to institute adequate internal controls and its agreement to pay a $1.7 billion forfeiture. (Id., ¶ 87.) The Deferred Prosecution Agreement, dated January 6, 2014 (DPA or 2014 DPA), entered into by JPMorgan under the authority granted by its board of directors, by its terms prohibits the Company from denying facts admitted in the Statement of Facts annexed to the DPA. (DPA, ¶ 17; see Am. Compl., ¶¶ 94-95.)

Plaintiff did not make a pre-suit demand upon the board of directors of JPMorgan to bring an action on its behalf. The amended complaint alleges that such demand "would have been futile because (1) the factual allegations . . . create a reasonable doubt that, as of the time the complaint [was] filed, the [Board] could properly exercise its independent and disinterested business judgment in responding to a demand since half or more of the current Board of

Directors face a substantial risk of personal liability in the present litigation; and (2) the Individual Defendants' knowing inaction in the face of a duty to act could not have been the product of sound business judgment of the directors." (Id., ¶127.) According to plaintiff, defendants face a substantial risk of liability for oversight violations because the Company admitted in the DPA that it had willfully failed to establish an adequate AML program. (Id., ¶ 128.)

The amended complaint pleads two causes of action, both for breach of fiduciary duty. The first alleges that defendants Dimon, Jackson, Crown, Weldon, Bowles, Bell, Burke, Raymond, and Flynn failed to fulfill the duty "to ensure that the Company implemented corrective steps specified in the [2013] OCC Consent Order" (id., ¶ 138), and the duty to ensure that the Company maintained "effective internal controls for detecting and reporting suspicious transactions in compliance with federal banking laws and regulations which was a basic component of their primary function of oversight of the Company." (Id., ¶ 140.)

The second cause of action alleges that defendants Dimon, Jackson, Crown, Weldon, Bowles, Burke, Raymond, Cote, Futter, and Novak "willfully fail(ed) to establish an adequate Anti-Money Laundering program" for more than one decade during which Madoff maintained the Chase Account. (Id., ¶ 148 [emphasis in original].) As a result of this failure, the Company allegedly had to pay millions of dollars in legal fees to defend a variety of lawsuits by victims of Madoff against the Company for aiding and abetting fraud through its failure to maintain a proper program of suspicious transaction detection; approximately $542 million to settle class actions brought by Madoff victims and the Madoff Trustee; and $1.7 billion to settle criminal charges with the Department of Justice. (Id., ¶ 149.)

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In support of the motion to dismiss, defendants initially argued that plaintiff fails to demonstrate that demand on the board is excused because the amended complaint does not plead that any member of the board lacks independence or has an interest in the transactions at issue, and fails to plead with particularity that the director defendants face a substantial likelihood of liability. (Defs.' Memo. In Supp. Of Motion To Dismiss at 2-3.) Plaintiff argued that demand is excused because the amended complaint pleads a "sufficiently significant likelihood of liability" on the part of the board, based on particularized allegations that red flags put the directors on notice of "serious problems with internal controls over money laundering." (Pl.'s Memo. In Opp. at 1-2.)

As noted at the outset, shortly after commencement of this action, two separate derivative actions were commenced in federal court by other shareholders, alleging that JPMorgan incurred substantial damages as a result of the board's failure to implement an adequate AML program or to ensure reporting of suspicious activities in Madoff's account. Applying Delaware law, the federal court dismissed each of the actions based on the plaintiff's failure to serve a pre-suit demand or to allege with sufficient particularity that the making of a demand was futile – i.e, that the demand was excused. (Central Laborers' Pension Fund v Dimon, 2014 WL 3639185, *2-4, 2014 US Dist LEXIS 100874 [SD NY July 23, 2014 No. 14-CV-1041 [Crotty, J.] [Central Laborers' Pension Fund], reconsideration denied 2014 WL 5786946, 2014 US Dist LEXIS 157261 [SD NY Nov. 6, 2014 No. 14-CV-1041], appeal docketed No. 14-4516 [2d Cir Dec. 8, 2014]; Steinberg v Dimon, 2014 WL 3512848, * 2-3, 2014 US Dist LEXIS 96838 [SD NY July 16, 2014 No. 14-CV-688] [Crotty, J.] [Steinberg] [collectively, federal court's demand futility decisions].) Defendants now argue, as a threshold matter, that plaintiff is barred by the doctrines of collateral estoppel and res judicata from relitigating the issue of demand futility.

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As the parties acknowledge, the issue of whether a pre-suit demand is required or excused is governed by the law of Delaware, the state of incorporation of JP Morgan. (Whitecap (US) Fund I, LP v Siemens First Capital Commercial Fin. LLC, 121 AD3d 584, 589 [1st Dept 2014]; Hart v General Motors Corp., 129 AD2d 179, 182 [1st Dept 1987] ["One of the abiding principles of the law of corporations is that the issue of corporate governance, including the threshold demand issue, is governed by the law of the State in which the corporation is chartered . . . ."], lv denied 70 NY2d 608; see also Draper v Paul N. Gardner Defined Plan Trust, 625 A2d 859, 865 n 9 [Del 1993] ["The issue of whether or not demand is required or excused is a matter of substantive Delaware corporation law"].)

In contrast, Delaware law does not govern the issue of whether the federal court's demand futility decisions preclude maintenance of this action. There is substantial authority that federal common law is applied in determining the preclusive effect of a federal judgment. (Marvel Characters, Inc. v Simon, 310 F3d 280, 286 [2d Cir 2002]; Carroll, ex rel Pfizer, Inc. v McKinnell, 2008 WL 731834, * 2 [Sup Ct, NY County Mar. 17, 2008 [Fried, J.].) In considering the preclusive effect of demand futility determinations under federal law, Delaware courts have held that "a state court is required to give a federal judgment the same force and effect as it would be given under the preclusion rules of the state in which the federal court is sitting." (Pyott v Louisiana Mun. Police Empls.' Retirement Sys., 74 A3d 612, 615-616 [Del 2013]; accord City of Providence v Dimon, 2015 WL 4594150, * 6 [Del Ch July 29, 2015] [City of Providence].)

This court need not resolve whether federal or New York law governs the standards for collateral estoppel and res judicata, as the parties do not claim that there is any material difference between these standards. Nor do they dispute that under both federal and New York

law, claim preclusion may be applied in the shareholder derivative context to a demand futility claim. (See e.g. Bansbach v Zinn, 1 NY3d 1, 10-11 [2003], rearg denied 1 NY3d 593 [2004] [applying New York collateral estoppel doctrine, but holding that "there being no identity of issue, [prior New York determination] does not estop plaintiff from litigating the futility of demand"]; Asbestos Workers Local 42 Pension Fund ex rel JPMorgan Chase & Co. v Bammann, 2015 WL 2455469, *15-16 [Del Ch 2015] [Asbestos Workers Local 42] [applying New York collateral estoppel doctrine to demand futility issue where New York court had previously decided that issue]; see also Carroll, ex rel Pfizer, Inc., 2008 WL 731834 at * 2 [applying federal collateral estoppel doctrine to wrongful refusal issue].)

It is well settled that collateral estoppel "prevents a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party. The doctrine applies if the issue in the second action was raised, necessarily decided and material in the first action, and if the party had a full and fair opportunity to litigate the issue in the earlier action." (Pinnacle Consultants v Leucadia Natl. Corp., 94 NY2d 426, 431-432 [2000] [internal quotation marks and citation omitted].)

Applying this standard, the court holds that collateral estoppel bars plaintiff's assertion of the second cause of action. Under Delaware law, where board oversight as opposed to a board decision is at issue, the test for demand futility is whether, under the particularized facts alleged, a reasonable doubt is created that the directors could properly have exercised their independent and disinterested judgment in responding to a demand. (Rales v Blasband, 634 A2d 927, 934 [Del 1993]; see Aronson v Lewis, 473 A2d 805, 814 [1984], overruled on other grounds by

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Brehm v Eisner, 746 A2d 244 [2000].)[4] In Central Laborers' Pension Fund and Steinberg, the federal court dismissed the actions under this test, after expressly determining issues identical to those raised by the second cause of action.

Like the instant actions, both federal actions involved claims that the directors breached their fiduciary duties by failing to ensure that JPMorgan maintained an effective AML program and internal controls. In Central Laborers' Pension Fund, the plaintiff asserted a claim for damages related to the Madoff account (2014 WL 3639185, at * 1-3), while in Steinberg, the plaintiff claimed damages as a result of the lack of internal controls and government investigations related not only to the Madoff account but also to other alleged misconduct, including manipulation of the London Interbank Offered Rate. (2014 WL 3512848, at * 1.) The federal court held that the plaintiffs failed to allege particularized facts that the majority of the outside directors "face[d] a 'substantial likelihood' of personal liability from [] legal action," and that the plaintiffs therefore failed to raise a reasonable doubt that [t]he board could have exercised disinterested and independent business judgment in considering the demand." (Central Laborers' Pension Fund, 2014 WL 3639185, at * 3; Steinberg, 2014 WL 3512848, at * 3.) In finding that the plaintiffs did not plead that the outside directors faced a substantial likelihood of personal liability, the court rejected the plaintiffs' claim that the failure to establish an "adequate" AML system stated a viable "Caremark claim"[5] against the outside directors for failure to exercise oversight over the Company. The court also held that the plaintiffs did not plead that the outside directors acted in bad faith by consciously failing to monitor or oversee the Company's operations. (Central Laborers' Pension Fund, 2014 WL 3639185, at * 4; Steinberg, 2014 WL

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[4] The test varies depending on whether or not there is a conscious decision by the board of directors to act or to refrain from acting. (Rales, 634 A2d at 933-934.) The court need not discuss these variations further in view of its holding that the claims in this action are precluded.

[5] The claim takes its name from Matter of Caremark Intl. Inc. Derivative Litig. (698 AD2d 959 [Del Ch 1996].)

3512848, at * 3.)

The court thus finds, and plaintiff does not dispute, that Central Laborers' Pension Fund and Steinberg decided demand futility issues that are virtually identical to those raised by defendants' motion to dismiss the second cause of action. Plaintiff also does not allege that the plaintiffs in the federal actions did not have a full and fair opportunity to litigate their claims of demand futility. The court accordingly holds that the second cause of action is precluded by collateral estoppel.

The court reaches a different result as to the first cause of action. In claiming that collateral estoppel does not bar the first cause of action, plaintiff argues that this action is different from the federal actions and "contains different allegations and claims not previously decided – Plaintiff's post-2008 claim." (Pl.'s Supp. Memo. at 9.) Defendants stop short of arguing that the plaintiffs in the federal actions pleaded a claim that JPMorgan incurred fines and penalties as a result of the directors' failure to comply with the 2013 OCC Consent Order. (See Defs.' Supp. Memo at 7.) As defendants point out, the 2014 Deferred Prosecution Agreement is pleaded in the complaints in the federal actions (see e.g. Central Laborers' Pension Fund Compl., ¶¶ 1-2, 37; Steinberg Compl., ¶ 5), and the complaints seek damages that include the penalties imposed by the DPA. (See Central Laborers' Pension Fund Compl., Prayer for Relief ¶ C; Steinberg Compl., ¶¶ 2, 8.) The DPA, does not, however, expressly state that the fines and penalties were imposed for the directors' violation of the 2013 OCC Consent Order. Nor do defendants cite any allegation of the complaints or any portion of the plaintiffs' briefs in the federal actions that claims that the fines and penalties in the DPA were imposed for the directors' violation of that Consent Order. The decisions in the federal actions also do not contain any indication that such claims were raised. The court accordingly holds that the federal court's

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demand futility decisions did not decide the issue of whether the plaintiffs sustained damages as a result of the directors' violation of the 2013 OCC Consent Order. Collateral estoppel therefore does not preclude the first cause of action.

The first cause of action is, however, precluded under the doctrine of res judicata. New York follows a "transactional analysis approach in deciding res judicata issues." (O'Brien v City of Syracuse, 54 NY2d 353, 357 [1981].) It is well settled that res judicata "bars successive litigation based on the same transaction or series of connected transactions" if there is a "judgment on the merits" and "the party against whom the doctrine is invoked was a party to the previous action, or in privity with a party who was." (Matter of People of the State of New York v Applied Card Sys., Inc., 11 NY3d 105, 122 [2008] [internal quotation marks and citation omitted].)

It is further settled that the plaintiff shareholder may be in privity with the plaintiff shareholder in a prior derivative action where, as here, there is no claim that the shareholder in the prior action did not adequately represent the plaintiff's interests. (See Parkoff v General Tel. & Elec. Corp., 53 NY2d 412, 420 [1981], rearg denied 54 NY2d 832 ["Because the claim asserted in a stockholder's derivative action is a claim belonging to and on behalf of the corporation, a judgment rendered in such action on behalf of the corporation by one shareholder will generally be effective to preclude other shareholders"]; Asbestos Workers Local 42 Pension Fund , 2015 WL 2455469, at *15 [same under New York collateral estoppel doctrine].) The rationale for this rule is that shareholder plaintiffs could otherwise "indefinitely relitigate the demand futility question in an unlimited number of state and federal courts, a result the preclusion doctrine is aimed at avoiding." (Henik v Labranche & Co., 433 F Supp 2d 372, 380 [SD NY 2006].)

Moreover, "dismissal of a derivative action for failure to plead demand futility is a final judgment on the merits for purposes of res judicata." (City of Providence, 2015 WL 4594150, at * 6 [so holding under New York res judicata doctrine]; Asbestos Workers Local 42 Pension Fund , 2015 WL 2455469, at *15 [same under New York collateral estoppel doctrine]; Henik, 433 F Supp 2d at 379 [so holding under federal res judicata and collateral estoppel doctrines].)

The remaining issue is therefore whether the first cause of action arises out of the same transaction as the federal actions. As the Court of Appeals explained in O'Brien v City of Syracuse, under the transactional approach, "once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy." (54 NY2d at 357.) "When alternative theories are available to recover what is essentially the same relief for harm arising out of the same or related facts such as would constitute a single 'factual grouping', the circumstance that the theories involve materially different elements of proof will not justify presenting the claim by two different actions."[6] (Id. at 357-358 [internal citation omitted]; accord UBS Secs. LLC v Highland Capital Mgt., L.P., 86 AD3d 469, 474-475 [1st Dept 2011]; Syncora Guar. Inc. v J.P. Morgan Secs. LLC, 110 AD3d 87, 96 [1st Dept 2013] [holding that where plaintiff "asserts different legal theories, but it seeks to recover for the same alleged harm based on the same underlying events" in the second action, res judicata bars the second action, as "[i]t is not necessary that the precise legal theories presented in the first action also be presented in the second action"] [internal quotation marks and citations omitted].) Res judicata thus applies "not only to claims actually litigated but also to claims that could have been raised in the prior litigation." (Matter of Hunter, 4 NY3d 260, 269 [2005].)

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[6] This case expressly overruled Smith v Kirkpatrick (305 NY 66) to the extent it held to the contrary. (O'Brien, 54 NY2d at 358, n 1.)

In adhering to the standard articulated in O'Brien, the Court of Appeals has observed that "[i]t is not always clear whether particular claims are part of the same transaction for res judicata purposes. A 'pragmatic' test has been applied to make this determination – analyzing whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment conforms to the parties' expectations or business understanding or usage." (Chen v Fischer, 6 NY3d 94, 100-101 [2005] [internal quotation marks and citations omitted]; accord UBS Secs. LLC, 86 AD3d at 474.)

In City of Providence v Dimon (2015 WL 4594150, supra), the Delaware Chancery Court recently held that a shareholder derivative action against JP Morgan directors was barred under the res judicata doctrine by Central Laborers' Pension Fund. The plaintiff there alleged that as a result of the directors' oversight failures, JPMorgan entered into various settlements and consent orders with federal regulators, including the 2013 OCC Consent Order and 2014 DPA, causing shareholders to bear over $2 billion in fines and penalties. The Court reasoned that the claims in Central Laborers' Pension Fund relied heavily on the DPA, and that the DPA and 2013 OCC Consent Order were "part of a series of transactions along with the other BSA/AML settlements and consent orders" on which the City of Providence also relied in asserting its claim for damages. (Id. at * 8.) In performing a transactional analysis for res judicata purposes, the Court thus compared the Consent Order and DPA cited in Central Laborers' Pension Fund with the various other orders relied on by the City of Providence in asserting damages, and held that they were all "part and parcel of JPMorgan's overall resolution of continuing BSA/AML and OFAC compliance violations." (Id.)

Here, the court also concludes, but under a transactional analysis different than that in City of Providence, that Central Laborers' Pension Fund and Steinberg bar the claims in the

instant action based on the 2013 OCC Consent Order and 2014 DPA. As discussed above, the complaints in the federal actions did not assert direct claims for the directors' violation of the 2013 OCC Consent Order, but did seek to recover as damages the amounts paid for penalties and fines under this Consent Order and the DPA. These damages were sought in connection with the plaintiffs' claim, among others, that the directors failed to maintain an adequate AML program over a long period, including the period prior to Madoff's exposure in December 2008. Significantly, at the time the complaints in the federal actions were brought, JPMorgan had already entered into all of the orders and agreements with federal authorities that are at issue, and the plaintiffs could have asserted a theory of damages based not only on the directors' long-standing failure to implement an adequate AML program, but also on their failure to comply with the 2013 OCC Consent Order. Put another way, this is a case in which the plaintiffs in the federal actions did not sue on a cause of action that could have been brought, not one in which the facts necessary to assert the cause of action did not arise until after the complaints were filed or litigated. (Compare e.g. O'Brien, 54 NY2d at 358 [holding that allegations involving "acts occurring after" the prior lawsuit were not barred by res judicata]; UBS Secs. LLC, 86 AD3d at 474 [holding that "to the extent the claims against [defendant] in the new complaint implicate events alleged to have taken place before the filing of the original complaint, res judicata applies"].) Plaintiff's opposition to dismissal of the instant action based on the asserted merit of his claims ignores that he is in privity with the plaintiffs in the federal actions and thus has had his day in court. The court accordingly holds that res judicata bars this action in its entirety.

The proposed amended complaint that plaintiff requests leave to serve does not change this result. Plaintiff seeks to add a cause of action based on a transaction that occurred after Central Laborers' Pension Fund or Steinberg was commenced. The proposed cause of action

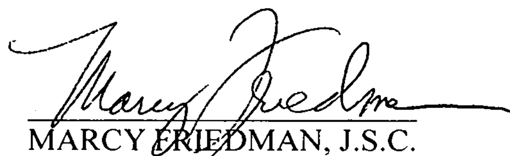
alleges that the directors' failure to maintain an adequate AML program between December 2008, when Madoff's fraud was exposed, and January 2013, when the OCC Consent Order was issued, resulted in the issuance of the $350 million penalty. (Pl.'s Memo. In Supp. of Motion for Leave to Amend at 2-3.) As plaintiff acknowledges, this cause of action does not allege new facts, but "only an additional theory of liability." (Id. at 6.) The proposed amended cause of action is therefore also barred by res judicata for the reasons stated above.

In view of this holding, the court need not address the sufficiency of the allegations of the complaint to plead that the demand is excused. (See e.g. City of Providence, 2015 WL 4594150, at * 6; Asbestos Workers Local 42 Pension Fund , 2015 WL 2455469, at * 20.)

It is accordingly ORDERED that the motion (001) by defendants James Dimon, Laban P. Jackson, Jr., Crandall C. Bowles, James A. Bell, James C. Crown, William C. Weldon, Stephen B. Burke, Lee R. Raymond, Timothy P. Flynn, David M. Cote, Ellen V. Futter, and David C. Novak for dismissal is granted to the extent of dismissing the amended complaint, with costs and disbursements as taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that the motion (002) by plaintiff Sam Wietschner for leave to file a second amended complaint is denied; and it is further

Dated: New York, New York
August 14, 2015



MARCY FRIEDMAN, J.S.C.