IN THE SUPREME COURT OF THE STATE OF DELAWARE

CITY OF PROVIDENCE, RHODE ISLAND, derivatively on behalf of JPMORGAN CHASE & CO., Plaintiff-Appellant, vs. JAMES DIMON, *et al.*, Defendants-Appellees, -and- JPMORGAN CHASE & CO., a Delaware Corporation, Nominal Defendant-Appellee.	No. 465, 2015 Case below: Court of Chancery of the State of Delaware, Civil Action No. 9292-VCP

ANSWERING BRIEF OF NOMINAL DEFENDANT-APPELLEE JPMORGAN CHASE & CO. AND THE DIRECTOR AND OFFICER DEFENDANTS-APPELLEES

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NATURE OF PROCEEDINGS[1]

This action was the *fifth* derivative case filed in 2014 alleging that the directors of JPMorgan Chase & Co. ("JPMC") should face personal liability for a series of anti-money-laundering ("AML"), Bank Secrecy Act ("BSA"), and economic sanctions settlements between JPMC and its regulators. In all four of the prior actions — two in federal court in New York, one in New York state court, and one in the Delaware Court of Chancery — plaintiffs had alleged, in virtually identical terms, that serving a pre-suit demand on JPMC's board of directors would be "futile" because the directors faced a "substantial likelihood" of liability for failing to supervise the bank's AML and related account monitoring programs. Instead of intervening in one of those prior-filed actions, City of Providence ("Providence") filed this lawsuit asserting the same claims and pursuing the same demand-futility theory. All three of the New York actions were subsequently dismissed, and the plaintiff in the other Delaware case voluntarily dismissed its claims following the dismissal of the New York actions.

In the decision on appeal, the Court of Chancery correctly held that, under the New York law of *res judicata*, the prior dismissal of at least one of the New York actions — *Central Laborers v. Dimon* — prohibits Providence from re-litigating claims involving the same subject matter here. In *Central Laborers*, the United States District Court held that plaintiffs had failed to plead that JPMC's directors face a "substantial likelihood" of liability under a *Caremark* theory. *See*

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[1] Citations to Providence's Opening Brief appear as "OB _." Citations to the Appendix to Providence's Opening Brief appear as "A_." Citations to the Court of Chancery's opinion shall be to the version attached as Ex. A to Providence's Opening Brief and appear as "OB Ex. A _."

2014 WL 3639185, at *5 (S.D.N.Y. July 23, 2014). In particular, the court held that the plaintiffs had failed to allege facts showing that the directors *consciously disregarded* their duty to oversee the bank's account monitoring programs, as would be required to support a *Caremark* claim and excuse demand. Based on the final judgment in *Central Laborers* dismissing plaintiffs' claims, the Court of Chancery concluded that Providence is not entitled to re-litigate the same claims here.[2]

On appeal, Providence tries to recast both its own complaint and its arguments below. In the Court of Chancery, Providence had sought to recover over *$2 billion* in asserted damages, representing the total amount paid by JPMC or its subsidiaries in the five AML/BSA/OFAC settlements — one with the Federal Reserve, one with the Office of Foreign Assets Control ("OFAC"), two with the Office of the Comptroller of the Currency ("OCC"), and one with the U.S. Attorney's Office. OB Ex. A at 22. In advancing that claim, Providence presented these five settlements, including the Deferred Prosecution Agreement ("DPA") with the U.S. Attorney's Office, as part of one "unitary" series of transactions. *Id.* at 22-23.

Providence's main argument on appeal, however, is that the DPA, which accounted for $1.7 billion of the over $2 billion in alleged damages sought below, was *not* part of the same series of transaction as the other settlements highlighted in the complaint. According to Providence, even though the DPA resolved claims under the Bank Secrecy Act and required the Bank to "continue its ongoing effort" to implement the very AML/BSA/OFAC-related settlements that Providence

[2] The Court of Chancery was not alone. Following the decision in *Central Laborers*, the New York Supreme Court dismissed one of the other actions, *Wietschner v. Dimon*, on the basis of *res judicata*. *See infra* pp. 8, 25-26.

complains about (A199 ¶ 19), the DPA can somehow be severed from those other settlements for *res judicata* purposes.

New York law does not permit a plaintiff to split claims in this manner. Under New York law, events are treated as part of the same "series of transactions," and are thus analyzed together for purposes of claim preclusion, when they are "related in time, space, origin, or motivation" or where the claims at issue would "form a convenient trial unit." *Chen v. Fischer*, 843 N.E.2d 723, 725 (N.Y. 2005). As the Court of Chancery concluded, the events and claims at issue here meet those requirements. All of the settlements relate to the "know your customer" procedures and controls that JPMC maintained to monitor activity in customer accounts for OFAC and AML/BSA purposes. All the claims, moreover, challenge the board's oversight of those procedures and controls. Providence itself recognized the "continuous and integral nature of the alleged wrongdoing" in its complaint, which "aggregate[ed]" the five settlements, "swept" them into a single Relevant Period, and treated them as "unitary" set of events. OB Ex. A at 22-23. The Court of Chancery's dismissal should thus be affirmed. *See* Point I.

The Court of Chancery's decision should also be affirmed on an alternative ground that was fully briefed and argued below: namely, Providence's demand futility arguments are barred by collateral estoppel. Both the *Central Laborers* court and other courts have already squarely determined that demand on JPMC's Board cannot be excused because no adequate basis has been alleged showing that a majority of JPMC's directors face a substantial likelihood of personal liability for failing to implement AML/BSA/OFAC-related controls. *See* Point II.

SUMMARY OF ARGUMENT

Defendants-appellees submit this response to Providence's summary of argument (OB 3-5) pursuant to Delaware Supreme Court Rule 14(b)(iv):

1. Denied. The Court of Chancery's decision is subject to affirmance not only based on *res judicata* but also based on collateral estoppel. With respect to *res judicata*, it is correct that New York "has adopted the transactional analysis approach in deciding *res judicata* issues." *O'Brien v. City of Syracuse*, 429 N.E.2d 1158, 1159 (N.Y. 1981).

2. Denied. The claims in *Central Laborers* and the claims in this action both focus on JPMC directors' alleged liability for failure to implement account-monitoring controls, as required by the AML, BSA and OFAC rules and regulations. Although the complaint in *Central Laborers* addressed the Madoff Ponzi scheme, it also included broader allegations of AML/BSA control failures at JPMC and addressed the series of government settlements related to alleged AML/BSA/OFAC control issues — just as Providence's complaint does. The claims in the two cases would make a "convenient trial unit," and treating them as a unit would conform to a reasonable person's "expectations" for purposes of New York *res judicata* law. *Chen v. Fischer*, 843 N.E.2d 723, 725 (N.Y. 2005).

3. Denied. The allegations in this action and in *Central Laborers* assert that JPMC directors failed to implement adequate AML/BSA/OFAC controls, leading to a series of related and cross-referencing government settlements. The settlements are part of the same "series of transactions" for New York *res judicata* purposes. *Id.*

APPELLEES' COUNTERSTATEMENT OF FACTS

A. The parties

Nominal defendant JPMC is a financial services company incorporated in Delaware. A-31 ¶ 17. Plaintiff City of Providence is a purported beneficial owner of JPMC stock. The director defendants are ten current and two former outside (or non-management) directors of JPMC. A-32-34 ¶¶ 19-25, 27-31. James Dimon, JPMC's Chairman and CEO, is the only JPMC officer who also serves on the Board. A-31-32 ¶ 18. The remaining defendant is Martha Gallo, who previously served as Head of Global Compliance of JPMC between 2011 and 2013, and served as General Auditor between 2006 and 2011. A-34 ¶ 32.

B. City of Providence's claims

Providence seeks to assert claims for damages allegedly suffered by JPMC as a result of the Company's entry into five settlements relating to economic-sanctions laws and AML-related provisions of the BSA. None of these settlements or related findings impugns the conduct of the director defendants or suggests that any director breached his or her fiduciary duties in any respect.

First, on August 25, 2011, JPMorgan Chase Bank, N.A. ("JPMCB" or the "Bank"), a subsidiary of JPMC, entered into a settlement with the U.S. Department of Treasury Office of Foreign Assets Control ("OFAC") arising out of the Bank's processing of certain transactions that allegedly violated the economic sanctions laws and regulations. A-29 ¶¶ 6-7; A-139-46 Compl. Ex. A (the "2011 OFAC Settlement"). The settlement imposed a fine of $88.3 million. *Id.*

Second, on January 14, 2013, the Bank and the Office of the Comptroller of the Currency (the "OCC") entered into a consent order relating to both AML/BSA and OFAC policies, procedures, and controls (the "2013 OCC Consent Order"). A-29-30 ¶¶ 10; A-108-09 ¶¶ 216-20; A-147-183 Compl. Ex. B.

Third, on January 14, 2013, JPMC and the Board of Governors of the Federal Reserve System (the "Fed") entered into a consent order with respect to the same subject matter covered in the OCC order of that date (the "2013 Fed Consent Order"). A29-30 ¶ 10; A-184-192 Compl. Ex. C. Neither the 2013 OCC Consent Order nor the 2013 Fed Consent Order resulted in a fine or penalty, but they both required the Bank to address deficiencies in *both* its AML/BSA and its economic sanctions compliance programs. A-29-30 ¶¶ 10; A-108-09 ¶¶ 216-20.

Fourth, on January 6, 2014, the Bank entered into a DPA with the Office of the United States Attorney for the Southern District of New York ("USAO") relating to alleged AML/BSA failures in the context of the Madoff fraud, pursuant to which the Bank forfeited $1.7 billion. A-30 ¶ 11; A-193-242 Compl. Ex. D. In connection with the DPA, the Bank agreed to a Statement of Facts, and the USAO filed an Information against the Bank containing two counts under the BSA, to which the Bank pleaded not guilty. A-206-A-213; *see also* Hearing Trans. at 7:2-9, *United States v. JPMorgan Chase Bank, N.A.*, No. 14 CR 007 (PKC) (S.D.N.Y. Jan. 8, 2014), Dkt. No. 6.

Fifth, on January 7, 2014 — the day after the DPA was entered — the Bank entered into a consent order with the OCC for a civil money penalty in the amount of $350 million (the "2014 OCC Consent Order"). A-30 ¶¶ 12; A-112-17 ¶¶ 226-

235; A-243-262 Compl. Ex. E. The 2014 OCC Consent Order recited, among other things, that on January 6, 2014, the Bank entered into the DPA. A-245, Compl. Ex. E at 2. The order included findings relating to the Bank's failure to file a Suspicious Activity Report ("SAR") in the U.S. regarding Madoff in 2008, incorporated findings from the 2013 OCC Consent Order, and made additional findings regarding *both* AML/BSA and OFAC issues. *See* A-244-249.[3]

In addition to the settlements and consent orders, Providence's complaint also relies on approximately 80 documents produced by JPMC in response to a Section 220 books and records demand. [redacted] *See* A-55-107 ¶¶ 99-215.

C. Duplicative shareholder litigation ensues

After the announcement of the DPA and 2014 OCC Consent Order, various JPMC shareholders filed duplicative derivative actions:

- *Wietschner*: On January 10, 2014, *Wietschner v. Dimon* was filed in New York. It alleged that JPMC's "board failed to ensure that the Company maintained an adequate . . . AML . . . program," and pointed to the DPA, the 2013 OCC and Fed Consent Orders, and the 2014 OCC Consent Order as causing damage to JPMC. 2015 WL 4915597, at *1 (Sup. Ct. N.Y. Cty. Aug. 14, 2015).

[3] For example, the 2014 OCC Consent Order included, among "critical deficiencies in the elements of the Bank's *AML/BSA* compliance program" that "[t]he Bank's internal controls, including filtering processes and independent testing, with respect to ... *OFAC* ... compliance are inadequate." A-247 (emphasis added).

- *Steinberg*: On February 3, 2014, *Steinberg v. Dimon* was filed in the United States District Court for the Southern District of New York (the "District Court"). It alleged that JPMC had been "damaged by a series of six recent, high-profile settlements with government agencies and private litigants arising out of allegations of egregious misconduct," including the DPA. 2014 WL 3512848, at *1 (S.D.N.Y. July 16, 2014).

- *Central Laborers*: On February 19, 2014, *Central Laborers Pension Fund v. Dimon* was filed in the District Court, also alleging that JPMC's directors had breached their fiduciary duties by failing to implement adequate AML/BSA controls, resulting in the DPA and the 2014 OCC Consent Order. 2014 WL 3639185, at *1 (S.D.N.Y. July 23, 2014).

- *Iron Workers:* On March 17, 2014, *Iron Workers v. Dimon* was filed in the Court of Chancery, also alleging *inter alia* that JPMC's directors breached their fiduciary duties by "fail[ing] to implement effective policies and procedures to prevent violations of the BSA." Public Complaint, Case No. 9449-VCN (Del. Ch. Mar. 20, 2014), ¶ 28.

- *City of Providence*: On May 23, 2014, this action was filed by Providence in the Court of Chancery. As noted, it was the fifth derivative action filed in four months relating to JPMC's AML/BSA/OFAC controls.

In July 2014, both *Steinberg* and *Central Laborers* were dismissed for failing to plead adequately that demand upon the JPMC Board was excused as futile. 2014 WL 3512848, at *5; 2014 WL 3639185, at *6. In both cases, the District Court held that the shareholder-plaintiffs had failed to plead facts showing bad faith or conscious disregard of their duties on the part of JPMC's directors, as would be needed to excuse demand based on a substantial likelihood of liability for failure of oversight under *Caremark*. *See Central Laborers*, 2014 WL 3639185, at *4. Plaintiff in *Central Laborers* subsequently moved for reconsideration of the District Court's dismissal, and on November 6, 2014, the District Court denied reconsideration. 2014 WL 5786946 (S.D.N.Y. Nov. 6, 2014).

Soon thereafter, on December 5, 2014, plaintiff in *Iron Workers* voluntarily dismissed its case — effectively acknowledging that it was barred by the decisions in *Steinberg* and *Central Laborers*. Case No. 9449-VCN (Del. Ch. Dec. 5, 2014).[4] As discussed in the next section, on July 29, 2015, the Court of Chancery then dismissed this action on the basis of *res judicata* in light of the decision in *Central Laborers*. And on August 14, 2015, the New York Supreme Court likewise dismissed *Wietschner* on *res judicata* grounds. 2015 WL 4915597, at *7.

D. The Court of Chancery's dismissal on *res judicata* grounds

On July 29, 2015, the Court of Chancery issued an opinion dismissing Providence's complaint in its entirety based on *res judicata*. OB Ex. A.

The Court of Chancery began by explaining that Congress has passed a series of laws designed to stop money laundering and enforce U.S. economic and trade sanctions, and charged OFAC, FinCEN, the OCC, and the federal banking agencies with overseeing those laws and related regulations. OB Ex. A at 4-5. The laws and regulations required JPMC to maintain certain programs and policies, and, as alleged in Providence's complaint, the cornerstone of JPMC's compliance regime — for *both* AML and economic sanctions purposes — were "Know Your Customer" standards and monitoring and screening of transactions to detect potentially risky customers and transactions. OB Ex. A at 6.

[4] Plaintiff in *Iron Workers* negotiated a stay of its action "until the Federal Court issues an order deciding the plaintiffs' motion for reconsideration in the *Central Laborers*' Action." *See* "Stipulation and [Proposed] Order Temporarily Staying Action," C.A. No. 9449-VCG (Del. Ch. Oct. 7, 2014), at p.4. As noted above, soon after the District Court's denial of the motion for reconsideration, plaintiff in *Iron Workers* voluntarily dismissed its action.

The Court of Chancery concluded that the "crux of [Providence's] Complaint is that, because of Defendants' failure to oversee the Company's operations and compliance during the 'Relevant Period' (January 1, 2005 through January 7, 2014), the Company's reputation has been damaged, and its stockholders have had to bear the cost of over $2 billion in fines and penalties" resulting from the five settlements and consent orders specified in Providence's complaint. *See* OB Ex. A at 3-4; 6-10.

The Court of Chancery went on to explain that, under the U.S. Supreme Court's Full Faith and Credit jurisprudence, it was required to give the District Court's prior judgment in *Central Laborers* the same force and effect as it would be given under New York law. OB Ex. A at 15-16 (citing *Pyott v. La. Mun. Police Emps.' Ret. Sys.*, 74 A.3d 612, 615 (Del. 2013)). Applying New York *res judicata* law, the court held that "the dismissal of a derivative action for failure to plead demand futility is a final judgment on the merits for purposes of res judicata." OB Ex. A at 16. The court also held that "[u]nder New York law, a later stockholder asserting derivative claims on behalf of a corporation is considered to be the 'same plaintiff' as a different stockholder asserting those claims on behalf of the corporation in a separate action." *Id.* at 17. Therefore, "[a]ssuming the subject matter of the claims is the same, res judicata will bar the later stockholder from stating a derivative claim if the previous claim was dismissed for failure to plead demand futility." *Id.* at 17-18. Plaintiff does not challenge these aspects of the decision below.

The Court of Chancery proceeded to consider whether the subject matter of the claims in *Central Laborers* overlapped sufficiently with the claims in the instant action for purposes of *res judicata*. *Id.* at 18-27. It explained that New York applies a "transactional analysis" approach to *res judicata*, under which "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," and even if "the theories involve materially different . . . proof." OB Ex. A at 18-19 (citing *In re Hunter*, 827 N.E.2d 269, 274 (N.Y. 2005); *O'Brien v. City of Syracuse*, 429 N.E.2d 1158, 1160 (N.Y. 1981)).

Applying New York's transactional approach, the Court of Chancery held that the claims in Providence's complaint arose "out of the same series of transactions that were at issue in" *Central Laborers*. OB Ex. A at 19. It found that the essence of plaintiff's complaint "is that the Board faces a substantial likelihood of liability for its bad faith oversight failures in relation to the Company's BSA/AML and U.S. Economic Sanctions compliance" and that the five settlements and consent orders, including the DPA, give rise to the *Caremark* claims. *Id.* at 19. The court explained further that the DPA, which was the focus of *Central Laborers*, was "part and parcel of JPMorgan's overall resolution of continuing AML/BSA and OFAC compliance violations" and that the DPA addressed not only Madoff but also AML/BSA issues more generally. *Id.* at 20. In particular, the DPA invokes both the 2013 OCC Consent Order and the 2013 Fed Consent Order and requires that:

> JPMorgan shall continue its ongoing effort to implement and maintain an effective BSA/AML compliance program in accordance with the requirements of the BSA and the directives and orders of any United States regulator . . . including without limitation the OCC and Federal Reserve Board, as set forth in the 2013 OCC Consent and the Fed Consent.

OB Ex. A at 21 (internal quotations omitted). The court observed that the 2014 OCC Consent Order references both the 2013 OCC Consent Order and the DPA, and includes a finding that JPMC's "internal controls, including filtering processes and independent testing, with respect to . . . OFAC . . . compliance are inadequate, and that those inadequacies resulted in the Company 'operat[ing] outside of the normal AML monitoring and OFAC screening controls.'" *Id.* Thus, the court held that "it is not possible to read" the settlements and orders and conclude that "they do not form a 'single factual grouping' and make 'a convenient trial unit.'" *Id.* at 22.

The Court of Chancery next identified a "further ground" for concluding that the DPA is part of the same series of transactions as the other AML/BSA settlements and consent orders: namely, "that Plaintiff's own allegations indicate that it is." *Id.* The court explained that Providence itself treats the settlements and consent orders as a "unitary" whole in its complaint, alleging repeatedly that "JPMorgan's violations resulted in over $2 billion in damages to the Company." *Id.* at 21-22. Similarly, the court noted that Providence "swept all of the alleged wrongdoing into one defined 'Relevant Period.'" *Id.* at 22-23. Finally, the court explained that Providence's complaint itself alleges that JPMC "addressed the various BSA/AML and U.S. Economic Sanctions laws and regulations as a unit,

especially after 2005 when six existing Company compliance policies were consolidated into one document." *Id.* at 23.

Based on "[t]he entirety of the Complaint's allegations and Plaintiff's assertions in its briefing and argument," the Court of Chancery concluded that the settlements and consent orders "fit together as a 'factual grouping'" and therefore the "DPA was one aspect of a series of transactions for purposes of [New York] preclusion analysis" and plaintiff is barred from pursuing its claims as a matter of *res judicata*. *Id.* at 24. The court thus dismissed the complaint with prejudice.

E. Defendants' alternative grounds for dismissal

After granting defendants' motion to dismiss on *res judicata* grounds, the Court of Chancery did not reach defendants' alternative grounds for dismissal (OB Ex. A at 14-15) — which were fully briefed and argued. These additional, alternative grounds for dismissal are: (i) collateral estoppel; (ii) failure to plead demand futility adequately, and (iii) lack of personal jurisdiction over Ms. Gallo. The first alternative ground for dismissal, which is also based on preclusion principles under New York law, is addressed in Point II below. Ms. Gallo is raising lack of personal jurisdiction as an alternative ground for affirmance in a separate brief filed in this Court.[5]

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[5] In the Court of Chancery, defendants also argued that, just as in *Central Laborers*, Providence has failed to plead demand futility with the requisite particularity. *See* A-297-325; A-2571-2592. As this Court has multiple grounds on which to affirm without having to decide whether Providence sufficiently pleaded demand futility, we do not address demand futility here. However, if this Court were not to affirm based on *res judicata* or collateral estoppel, defendants respectfully submit that the demand futility issue be remanded for decision in the first instance by the Court of Chancery.

ARGUMENT

I. THE COURT OF CHANCERY CORRECTLY DISMISSED PROVIDENCE'S CLAIMS BASED ON *RES JUDICATA*.

A. Question Presented

Did the Court of Chancery correctly conclude that Providence is barred as a matter of *res judicata* from pursuing a derivative suit against JPMC's directors, without making a demand on JPMC's board, based on the theory that the directors failed to implement adequate AML/BSA controls? OB 23; OB Ex. A at 16-27.

B. Scope of Review

This Court's review of a dismissal under Rule 23.1 is *de novo*. *Brehm v. Eisner*, 746 A.2d 244, 253 (Del. 2000). A trial court determination that a claim is barred by *res judicata* raises a legal question that is also reviewed *de novo*. *Betts v. Townsends, Inc.*, 765 A.2d 531, 533 (Del. 2000).

C. Merits of Argument

In the Court of Chancery, Providence raised various arguments against the *res judicata* effect of the District Court's decision in *Central Laborers*. On appeal, however, Providence has narrowed its focus considerably. Providence does not dispute that New York law governing *res judicata* applies; it does not dispute that under New York law it is considered to be the same party as the shareholder derivative plaintiffs in *Central Laborers*; and it does not dispute that under New York law, *res judicata* bars not only claims that were raised in an earlier action, but also claims arising out of the same transaction or series of transactions considered in the earlier action. OB 24-27; OB Ex. A at 18-19; A-294-97; A-2297-2299.

Plaintiff's *only* argument on appeal against the application of *res judicata* is that *Central Laborers* purportedly addressed only the DPA and AML/BSA issues concerning Madoff, whereas its complaint here also addresses other settlements "based either exclusively on economic sanctions violations or primarily on interconnected economic sanctions and AML/BSA violations." OB 27-28. In an effort to support this distinction, Providence states that it is no longer "seeking to recover on the Company's behalf the $1.7 billion forfeiture agreed to by JPMC in the DPA or any other damage to the Company flowing directly from the DPA." OB 8 n.6. Providence thus has walked away from 80% of the damages it claimed in the Court of Chancery.[6] This attempt at a post-dismissal amendment of the complaint, and argument to this Court based on a limitation of claims that was not presented to the court below, is not permissible. *See* Supr. Ct. R. 8; Ct. Ch. R. 15(aaa). But even if this Court were to allow plaintiff to recast its complaint in this belated fashion, the result is the same: *res judicata* applies.

As the Court of Chancery correctly held, the five federal settlements and consent orders invoked by Providence — and attached as the five exhibits to its complaint — are all part of one series of transactions. Therefore, under New York's transactional analysis, claims arising out of any of those settlements or the

[6] *See* A28-29 ¶ 4 (alleging in the complaint that "[a]s a result of Defendants' failure to oversee the Company's operations and compliance, irreparable harm has been caused to the Company's reputation, as well as damage to shareholders through the payment of over $2 billion of shareholder money to pay fines and penalties"); A30 ¶ 13 ("To date, over $2 billion of shareholder money has been paid as a penalty for the Company's various criminal acts and civil violations."); A-136 (demanding JPMC be awarded "the damages sustained by it as a result of the violations set forth above from each of the Defendants").

underlying conduct are barred by *Central Laborers* as a matter of *res judicata* — it makes no difference whether Providence has abandoned its claim for recovery of the amount paid under the DPA.

1. New York's "transactional" approach to *res judicata*

New York "has adopted a transactional analysis approach in deciding *res judicata* issues. Under this address, 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 seeking a *different remedy*." *O'Brien v. City of Syracuse*, 429 N.E.2d 1158, 1159 (N.Y. 1981) (emphasis added). In applying this standard, New York courts look to "whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectation or business understanding or usage." *Chen v. Fischer*, 843 N.E.2d 723, 725 (N.Y. 2005) (internal citation omitted); *see also* OB 26-27.[7]

The decision of the New York Court of Appeals in *O'Brien* marked a shift in New York *res judicata* law. As the New York Appellate Division has explained:

> It used to be the rule that, even if the two actions arose out of an identical course of dealing, the second was not barred by res judicata if "[t]he requisite elements of proof and hence the evidence necessary to sustain recovery var[ied] materially." However, the Court of Appeals expressly rejected that method of analysis in *O'Brien v. City*

[7] New York's "transactional" approach to *res judicata* is not unusual. *See, e.g.*, Restatement (Second) of Judgments, § 24 (1982) ("When a . . . judgment rendered in an action extinguishes the plaintiff's claim . . . the claim extinguished includes all rights of the plaintiff to remedies against the defendant *with respect to all or any part of the transaction, or series of connected transactions*, out of which the action arose.") (emphasis added).

> *of Syracuse*, 54 N.Y.2d 353 (1981). There it held that "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." *Id.* at 357.

UBS Securities LLC v. Highland Capital Mgmt., L.P., 86 A.D.3d 469, 474 (N.Y. App. Div. 2011). Since *O'Brien*, "even if there are variations in the facts alleged, or different relief is sought, the separately stated 'causes of action' may nevertheless be grounded on the same gravamen of the wrong upon which the action is brought." *Smith v. Russell Sage College*, 54 N.Y.2d 185, 192 (N.Y. 1981).

New York courts interpret the *res judicata* doctrine broadly, and the Court of Appeals has stated that the "policy against relitigation of adjudicated disputes is strong enough generally to bar a second action even where further investigation of the law or facts indicates that the controversy has been erroneously decided." *Reilly v. Reid*, 379 N.E.2d 172, 175 (N.Y. 1978).

2. *Central Laborers* arose out of the same "series of transactions" as this case.

In dismissing Providence's complaint, the Court of Chancery explained in detail why the DPA cannot "be separated from the other settlements and consent orders" entered by JPMC "and treated as a distinct 'factual grouping'" (OB Ex. A at 20). On appeal, Providence's sole argument is that the Court of Chancery erred in reaching this conclusion. Providence argues that "[t]he DPA . . . had no connection to: [*e.g.*,] economic sanctions violations [or] money laundering for rogue nations, terrorists, and drug cartels . . ." and therefore could not be part of the same series of transactions as the other settlements. OB 28.

There are at least four separate bases that would lead a New York court to reject Providence's argument and conclude instead that the settlements and consent orders, along with the underlying conduct of JPMC's officers and directors in implementing and monitoring AML/BSA and OFAC/economic sanctions controls, are part of the same series of transactions for *res judicata* purposes.

a. Providence itself treats the settlements and consent orders as a single series of transactions.

First, as the Court of Chancery observed, Providence *itself* — in its complaint in this case — "aggregate[ed]" the DPA with the other settlements and treated them in a "unitary" fashion. OB Ex. A at 22-23. The complaint "moves from one [alleged compliance violation] to the next in a continuous narrative with little or no regard to which settlement or settlements were implicated"; it combines all of the OFAC, OCC and DPA penalties and fines into one $2 billion "unit"; and it alleges that JPMC likewise "addressed the various BSA/AML and [OFAC] laws and regulations as a unit." *Id.* In addition, the complaint includes exactly five exhibits — namely, the five AML/BSA/OFAC settlement agreements (*see* A-139-262) — and links "BSA/AML" and "U.S. Economic Sanctions"/"OFAC" policies and procedures together over 20 times.[8]

[8] *See, e.g.*, A-28 ¶ 3 ("Defendants knew that the Company's BSA/AML and U.S. Economic Sanctions policies and procedures were inadequate"), A43-44 ¶¶ 72-73 [redacted] A-36 ¶ 39 ("In both money laundering and terrorist financing, criminals can exploit loopholes and other weaknesses in the legitimate financial system . . ."); A-55 Point VII ("JP Morgan's Repeated Violations of Federal AML/BSA Laws and Regulations, and U.S. Economic Sanctions"); A-66 ¶ 130 [redacted] A-68-69 ¶¶ 135-36 [redacted] A-71 ¶ 143 [redacted]

This unified treatment has also been on display in Providence's briefing. In opposing the motion to dismiss in the court below, Providence argued, for example, that "in the wake of the OFAC penalty and the 2013 Consent Order, [JPMC] continued violating AML/BSA laws and regulations." A-2286. Likewise, although Providence now disclaims continued reliance on the DPA, its appellate brief still asserts that the settlement agreements attached to the complaint addressed "interconnected economic sanctions and AML/BSA violations." OB 27.[9]

New York courts attach significance to a plaintiff's own characterizations and framing of its complaint in determining whether distinct events are part of the same series of transactions. *See, e.g.*, *UBS Securities*, 86 A.D.3d at 475 ("[W]e note that, when seeking permission to amend the complaint, UBS itself asserted

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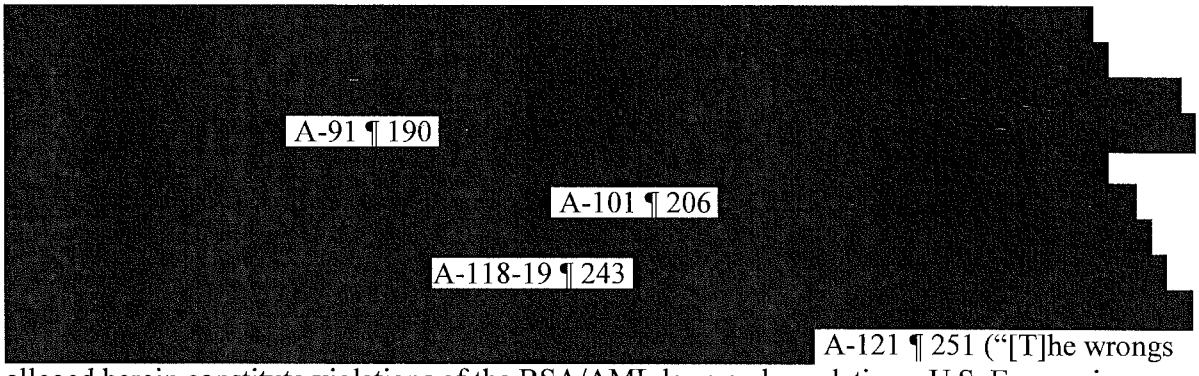
(. . . continued)



A-121 ¶ 251 ("[T]he wrongs alleged herein constitute violations of the BSA/AML laws and regulations, U.S. Economic Sanctions, as well as the Company's internal policies . . .").

[9] *See also* OB 4-5 (the complaint is based on violations of "U.S. economic sanctions" "related" to and "associated with" AML/BSA violations); OB 7 ("The Complaint alleged JPMC's BSA/AML deficiencies . . . in the context of terrorist financing."); OB 9

that 'the new causes of action arise out of the same or related circumstances and events as UBS's pending claims.'"); *Chen v. Fischer*, 843 N.E.2d at 725 (looking to "whether [the transactions'] treatment as a unit conforms to the parties' expectation"). Thus, Providence's own pleadings and arguments further underscore that its claims are barred as a matter of *res judicata*.

The fact that Providence has made an 11th hour effort to alter the *remedy* it is seeking (by dropping its claim for recovery of the $1.7 billion DPA penalty) does nothing to alter the fundamental inter-connection of the five settlements that Providence highlighted in (and attached to) its complaint. The New York Court of Appeals has made clear that pursuit of a "different remedy" in a subsequent action does *not* protect that action from application of New York *res judicata* principles when, as here, the two actions arise out of the "same transaction or series of transactions." *O'Brien*, 429 N.E.2d at 1159.

b. JPMC and the Board treated AML/BSA and economic sanctions oversight as related and therefore also treated the settlements as related.

Second, the documents Providence relies on in its complaint show that JPMC has adopted a coordinated approach to AML/BSA/ OFAC compliance. [redacted] A-43-44 ¶ 72. [redacted]

[redacted] A-44 ¶ 73. [redacted] A-46-51 ¶¶ 76-88. [redacted] A-1061. [redacted] *See, e.g.*, A-68-69 ¶¶ 135-36; A-82-83 ¶ 172.

The allegations [redacted] in the complaint also show that JPMC's AML/BSA controls and its OFAC controls rely on the *same* two primary tools: (i) collection of know-your-customer ("KYC") material and (ii) comprehensive transaction screening. A-28 ¶ 4. Both the AML/BSA issues and the OFAC issues addressed in the various settlements and consent orders stem from alleged deficiencies in these two elements of JPMC's compliance program. *See, e.g.*, A-69 ¶ 138 [redacted] A-104 ¶ 207 [redacted]

[redacted] A-66-67 ¶ 130.

Given JPMC's own unified treatment of AML/BSA and OFAC compliance, *Caremark* claims alleging inadequate oversight of OFAC compliance and inadequate oversight of AML/BSA compliance necessarily involve overlapping allegations of inaction by the Board and are necessarily part of the same series of transactions. As was the case in *UBS Securities LLC*, "it can hardly be said that the claims in the two actions are so unrelated that reasonable business people . . . would have expected them to be tried separately." 86 A.D.3d at 475. Here, "reasonable business people" — in particular JPMC itself — adopted a unified approach to AML/BSA and OFAC issues. The claims would thus "form a convenient trial unit." *Id.* at 474.

c. Federal regulators treat AML/BSA and economic sanctions as related and implemented the settlements and consent orders as an interrelated whole.

Third, although the *Central Laborers* complaint focused on the DPA, a review of the DPA makes clear that, from the standpoint of federal regulators themselves, the DPA was "part and parcel of JPMorgan's overall resolution of continuing BSA/AML and OFAC compliance violations that had given rise to the previous settlements and consent orders." OB Ex. A at 20. One of the principal prospective remedies imposed by the DPA was a requirement that the Bank "continue its ongoing effort to implement and maintain an effective BSA/AML compliance program," as set forth in the 2013 OCC and Fed Consent Orders. A199 ¶ 19. Indeed, to ensure compliance with this provision, the DPA specifically requires the Bank to provide quarterly reports to the USAO "describing the status

of [its] implementation of the remedial changes to its BSA/AML compliance program [as] required by" the 2013 OCC Consent Order and the 2013 Fed Consent Order. A200 ¶ 20.

This remedy was selected for a reason. In resolving claims under the BSA against the Bank, the USAO alleged that JPMC's "fail[ures]" with respect to Madoff resulted from AML/BSA issues of the same type that had been identified by other federal regulators: the Information thus charged not only that the Bank was required by the BSA to file a SAR in the United States related to Madoff's fraud, but also that JPMC did not "maintain adequate policies, procedures, and controls to ensure compliance with the BSA," in particular as regards the collection and transmission of know-your-customer . . . information to the Bank's internal compliance function. A-210-11. These charges mirrored the language used in other settlements, including the 2013 OCC Consent Order. *Compare* A150 ¶ 4. And these same allegations of "systemic" "enterprise-wide" deficiencies were heavily emphasized by the plaintiff in *Central Laborers*. *See* A-293-294; A-455; A-364-65 ¶¶ 125-27; A-369-70 ¶ 141; A-439-40, ¶¶ 395-98.

Moreover, just as the DPA referenced the earlier agreements, the 2014 OCC Consent Order — issued a day after the DPA — also cited and referenced the agreements that preceded it, including the DPA, the 2013 OCC Consent Order, and the 2013 Fed Consent Order. In fact, six of the fourteen findings recited in the 2014 OCC Consent Order are quoted verbatim from the 2013 OCC Consent (which, as explained, was in turn referenced specifically in the DPA). A-245-47 ¶¶ 1-6. The overlapping findings include allegedly deficient communication by

JPMC concerning "foreign branch suspicious activity" — similar to the allegation in the DPA relating to JPMC's non-filing of a SAR in the U.S. despite a SAR-equivalent being filed in the UK. *Compare* A-246-47; A-230-32. And one of the few "novel" findings not carried over from an earlier consent order concerns the Bank's interactions with Madoff feeder funds and the non-filing of a SAR in the United States — again, these are items that are included in the DPA. A-248 ¶ 11. This overlap reflects the reality that the DPA and the 2014 OCC Consent Order were negotiated in tandem, as evidenced by their back-to-back announcements on January 6 and 7 of 2014, as well as their cross-references to one another. *See* A-245.

Providence nonetheless asserts that the various settlement agreements and consent orders deal with "different types of violations" (OB 24) — suggesting that AML/BSA issues are entirely separate from OFAC/economic sanctions. But the settlements belie this theory: federal regulators used the *same* consent orders to provide direction to JPMC on *both* AML/BSA issues and OFAC/economic sanctions issues — treating them as parts of a unified compliance topic. *See, e.g.*, A155, A167 (2013 OCC Consent Order requiring JPMC to remedy issues with "BSA/AML/OFAC" obligations and requiring the Bank to adopt an "Audit Program" to oversee "remediation efforts to strengthen [its] *BSA/AML/ OFAC compliance program*") (emphasis added).[11]

[11] *See also* A-188 (2013 Fed Consent Order requiring the Bank to "improve the firmwide compliance risk management program with regard to BSA/AML Requirements and the regulations issued by [OFAC]"); A245-47 (2014 OCC Consent Order interweaving allegations of BSA/AML and OFAC violations and noting "[i]nadequate controls" that resulted in certain clients "operat[ing] outside of the normal AML monitoring and OFAC screening controls"); A-72 ¶ 149 [redacted]

The various settlement agreements and consent orders thus constitute a tightly knit group of resolutions with regulators, precisely as the Court of Chancery found. Given the extensive overlap, the facts are undoubtedly "related in time, space, origin, [and] motivation." *O'Brien*, 429 N.E.2d at 1159. It is also clear that treating them "as a unit" would conform to JPMC's and the federal government's "expectations," "business understandings" *and* common "usage." *Chen*, 843 N.E.2d at 725.

d. All of the conduct alleged in Providence's complaint could have been alleged in Central Laborers

Fourth, all of the conduct concerning JPMC's AML/BSA and economic sanctions controls, as well as the various settlements and consent orders, occurred *before* the date *Central Laborers* was filed. Accordingly, the shareholder plaintiffs in *Central Laborers* — who as a matter of New York *res judicata* law must be treated as identical to the shareholder plaintiff here — could have included all of Providence's factual allegations and claims in their action.

Recently, in dismissing another AML/BSA-related action against JPMC's board on *res judicata* grounds, the New York Supreme Court emphasized this precise point. In *Wietschner v. Dimon*, the court observed that *Central Laborers* and *Steinberg* had sought "to recover as damages the amounts paid for penalties and fines under [the 2014 OCC Consent Order] and the DPA" and that "[t]hese damages were [also] sought [by *Wietschner*] in connection with [his] claim, among others, that the directors failed to maintain an adequate AML program over a long period." 2015 WL 4915597, at *7. The court explained that, under New York's

transactional *res judicata* analysis, it was significant that "at the time the complaints in the federal actions were brought, [JPMC] had already entered into all of the orders and agreements with federal authorities that are at issue." *Id.*[12]

Like *Wietschner*, this is not a case "in which the facts necessary to assert the cause of action did not arise until after the complaints were filed or litigated" in the previously decided action. *Id.* Given that Providence is "in privity with the plaintiffs in the federal actions," Providence "has had [its] day in court" and may not relitigate the issues that were or could have been litigated in *Central Laborers*. *Id.*

[12] *See also Tovar v. Tesoros Prop. Mgmt., LLC*, 119 A.D.3d 1127, 1129 (N.Y. App. Div. 2014) ("Although the present action concerns wages allegedly owed for a different time period than the City Court claim, inasmuch as it had matured at the time that plaintiff commenced the prior action . . . plaintiff could have also raised the current claim at that time . . . and was not entitled to split his claim for unpaid wages into separate actions."); *O'Brien*, 429 N.E.2d at 1159 (only allowing claims to proceed based on facts arising *after* the judgment in the previous lawsuit was issued).

II. THE COURT OF CHANCERY'S DECISION SHOULD BE AFFIRMED ON THE ALTERNATIVE GROUND THAT PROVIDENCE'S DEMAND FUTILITY ALLEGATIONS ARE BARRED BY COLLATERAL ESTOPPEL.

A. Question Presented

Should this Court affirm dismissal on the alternative ground that Providence is collaterally estopped from litigating the issue of whether demand on JPMC's Board should be excused because a majority of JPMC's directors face a substantial likelihood of personal liability for supposedly failing to implement AML/BSA-related controls? A-288-294; A-2565-2570; A-2611-2663.

B. Scope of Review

This question presents an alternative basis for dismissal that was fairly presented to the trial court but not decided. *See* Del. Sup. Ct. R. 8. If the court chooses to address this argument, review is *de novo*.

C. Merits of Argument

If not affirmed on the basis of *res judicata*, the Court of Chancery's dismissal should nonetheless be affirmed for the alternative reason that Providence's complaint is barred as a matter of collateral estoppel.[13] As discussed above, Delaware courts are obligated to accord a judgment entered by another state or federal court of competent jurisdiction the same force and effect — including for purposes of collateral estoppel — as would another court in the state in which

[13] *See Central Laborers Pension Fund v. News Corp.*, 45 A.3d 139, 141 (Del. 2012) ("[T]his Court may rest its appellate decision on any issue that was fairly presented to the Court of Chancery, even if that issue was not addressed by that court.").

the rendering court sits. *See supra* p. 10. Again, New York law governs the collateral estoppel effect of the New York courts' prior opinions. *Cavalier Oil Corp. v. Harnett*, 564 A.2d 1137, 1140-41 (Del. 1989) (holding that Virginia state law applied to determine preclusive effect of an adjudication of a state law claim brought with federal securities law claims in the Eastern District of Virginia); *Pyott*, 74 A.3d at 616-17 (applying California collateral estoppel law to bar derivative lawsuit duplicative of one previously dismissed by California federal court on demand futility grounds).

Under New York law, collateral estoppel applies if two elements are met. First, "the party seeking the benefit of collateral estoppel must prove that the identical issue was necessarily decided in the prior action and is decisive in the present action. Second, the party to be precluded from relitigating an issue must have had a full and fair opportunity to contest the prior determination." *D'Arata v. N.Y. Cent. Mut. Fire Ins. Co.*, 564 N.E.2d 634, 636 (N.Y. 1990). Moreover, New York courts have long held that, "where one shareholder derivative action is dismissed for failure to adequately plead that the corporation's board of directors is disqualified from considering whether to initiate litigation, all other shareholders of that corporation are precluded from relitigating that issue." *Carroll ex rel. Pfizer, Inc. v. McKinnell*, 2008 WL 731834, at *2 (Sup. Ct. N.Y. Cty. Mar. 17, 2008); *accord Parkoff v. Gen. Tel. & Elecs. Corp.*, 425 N.E.2d 820, 824 (N.Y. 1981).[14]

[14] *See also Henik ex rel. LaBranche & Co. v. LaBranche,* 433 F. Supp. 2d 372, 380 (S.D.N.Y. 2006) ("[I]f this were not the rule, shareholder plaintiffs could indefinitely relitigate the demand futility question in an unlimited number of state and federal courts, a result the preclusion doctrine specifically is aimed at avoiding."); *Levin ex rel. Tyco Int'l Ltd. v. Kozlowski,* 2006 WL 3317048, at *7-9, 13 (Sup. Ct. N.Y. Cty. Nov. 14, 2006), *aff'd*, 45 A.D.3d 387 (App. Div. 2007)

In the Court of Chancery, Providence argued that the issues presented in this case are different from those addressed in *Central Laborers*. A-2288-2296.[15] Providence is wrong. The dispositive legal issue here is identical to the one in *Central Laborers* — namely, whether pre-suit demand on JPMC's Board was futile because the Board faced a substantial likelihood of liability for failing to implement AML/BSA controls — and the court in *Central Laborers* squarely addressed and decided that issue after full briefing by the shareholder plaintiff on a motion to dismiss and a motion for reconsideration.

In dismissing *Central Laborers* with prejudice for failure adequately to plead demand futility, the District Court expressly rejected plaintiff's contention that JPMC's directors "face a substantial likelihood of liability as a result of their failure to implement a reasonable anti-money laundering system." 2014 WL 3639185, at *3. Like Providence, plaintiff in *Central Laborers* had alleged that

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(. . . continued)

(prior dismissal by federal court on the ground that plaintiff shareholders did not have standing to bring a derivative suit precluded two other shareholders from raising the same issue).

[15] Providence also alleged that demand is futile because JPMC's directors are not independent due to the compensation they receive, the Company's extension of credit or financial services to them, and personal and business relationships among the Board. A-2292-2294. These allegations, however, have been made and rejected in at least five recent cases; given those prior decisions, Providence is barred as a matter of collateral estoppel from raising these issues again. *See Central Laborers*, 2014 WL 3639185, at *5 (finding allegations regarding the directors' stock compensation insufficient to excuse demand); *Steinberg*, 2014 WL 3512848, at *5 (finding allegations based on the directors' compensation, or the receipt by the directors or their affiliated companies of credit, leases, or financial advisory services insufficient to excuse demand); *In re JPMorgan Chase & Co. Deriv. Litig.*, 2014 WL 1297824, at *7 (S.D.N.Y. Mar. 31, 2014); *Wandel v. Dimon*, So-Ordered Oral Argument Tr., at 56, Index No. 651830/2012 (Sup. Ct. N.Y. Cty. Jan. 23, 2014), Dkt. No. 79; *City of Roseville Emps.' Ret. Sys. v. Dimon*, Index No. 650294/2012 (Sup. Ct. N.Y. Cty. July 12, 2012), Dkt. No. 11, at 7, 10-13.

JPMC's directors "breached their fiduciary duties to JPMorgan by failing to implement or maintain effective AML controls." A-364-365 ¶¶ 125-27; A-369-70 ¶ 141; A-439-440 ¶¶ 395-98; A-293. In opposing defendants' motion to dismiss, plaintiff in *Central Laborers* also emphasized that, in connection with the DPA, the USAO charged JPMC's bank subsidiary "with a willful and systemic failure to establish *any* of the minimum requirements of an AML compliance program as required by the BSA" and, further, that the 2013 OCC Consent Order found that, by 2013, the bank "continued to have an inadequate system of internal controls and independent testing." A-455-456 (emphasis in original); *see also* A-293.

The court in *Central Laborers* rejected these arguments and concluded that serving a pre-suit demand on JPMC's board would not have been futile. Under New York law, Providence is therefore barred by collateral estoppel from raising the same issue here. *See Asbestos Workers Local 42 Pension Fund v. Bammann*, 2015 WL 2455469, at *1 (Del. Ch. May 21, 2015); *Carroll*, 2008 WL 731834, at *2; *Henik*, 433 F. Supp. 2d at 380.

Similar to its *res judicata* arguments, Providence also argued below that the issue presented in *Central Laborers* was not "identical" to the issue in this case because (i) *Central Laborers* focused on Madoff, while Providence's "claims concern the board's knowing disregard of violations of BSA/AML laws . . . as well as violations of U.S. Economic Sanctions over several years"; and (ii) Providence's allegations rely on documents obtained through a books and records request, none of which were referenced in *Central Laborers*. *See* A-2289-91.

These arguments are based on a misapprehension of both New York collateral estoppel law and the clear factual similarities between the claims here and those in *Central Laborers*. First, under New York law, "[t]he identity element of collateral estoppel does not require that the issues to be exactly *identical*," only "substantially or essentially the same." 9 Carmody-Wait 2d, New York Practice § 63:472 (emphasis added); *see also Thomas v. Venditto*, 925 F. Supp. 2d 352, 361 (E.D.N.Y. 2013) (identity element is satisfied if issues are "substantially the same"). Nor is New York law unique in this regard; as the Restatement (Second) of Judgments states, collateral estoppel is intended to "prevent repetitious litigation of what is essentially the same dispute" even where "there is a lack of total identity" of issues. *See* Restatement (Second) of Judgments § 27, cmt. C (1982).[16] When a party "did in fact litigate an issue of ultimate fact and suffered an adverse determination, new evidentiary facts may not be brought forward to obtain a different determination of that ultimate fact." *Id.*

As a result, simply alleging additional facts in support of the same general theory of liability does not render the "issue" different for collateral-estoppel purposes. *Levin*, 2006 WL 3317048, at *8-9 (applying collateral estoppel "even if there are variations in the facts" or evidence alleged).[17] Indeed, if the law were

[16] New York courts rely on the Restatement when applying the doctrines of collateral estoppel and *res judicata*. *See, e.g.*, *Ryan v. N.Y. Tel. Co.*, 467 N.E.2d 487, 490 (N.Y. 1984).

[17] *See also In re Bed, Bath & Beyond Inc. Deriv. Litig.*, 2007 WL 4165389, at *3, 5-6 (D.N.J. Nov. 19, 2007) (issue identity requirement met under New York law even where federal plaintiff "proffers new claims," names "five other defendants," and identifies additional "backdated options, and insider trades," because all "still derive from the same gravamen of wrong as the state action").

otherwise, shareholders could "indefinitely relitigate" demand futility by continually adding allegations to prior complaints. *Henik*, 433 F. Supp. 2d at 380. This would undermine collateral estoppel's entire purpose of "reduc[ing] litigation and conserv[ing] the resources of the court and litigants." *Kaufman v. Eli Lilly*, 482 N.E.2d 63, 67 (N.Y. 1985).[18]

Second, Providence is incorrect that *Central Laborers* focused exclusively on Madoff — instead, as discussed in Point I above, the gravamen of *Central Laborers*, as here, was that JPMC's directors face a substantial likelihood of liability for failing to maintain effective AML controls — both during Madoff's Ponzi scheme and thereafter. *See supra* pp. 11-13, 17-25; A-292-94. Indeed, in dismissing the complaint in *Central Laborers*, the District Court took careful note of, and rejected, the plaintiff's contention that JPMC's directors "face a substantial likelihood of liability as a result of their failure to implement a reasonable anti-money laundering system." 2014 WL 3639185, at *3.

Finally, courts have rejected Providence's argument that collateral estoppel is not applicable where a subsequent shareholder plaintiff obtained books and records while the prior shareholder did not. In *Asbestos Workers Local 42 Pension Fund v. Bammann*, for example, the Court of Chancery — applying New York law

[18] *See also Arduini v. Hart*, 774 F.3d 622, 630 (9th Cir. 2014) (applying Nevada law in a derivative action, the court rejected the argument that "additional allegations" create a "different issue" because accepting that position "would mean that issue preclusion would almost never apply — subsequent [derivative] plaintiffs could simply add more allegations (or more specific allegations) of corporate malfeasance, and then claim there was no identity of issues. Defendants would then be forced to repeatedly relitigate demand futility, leading to 'multiple litigation,' wasted judicial resources, and potentially inconsistent proceedings").

— rejected plaintiff's argument that collateral estoppel should not apply because it had pleaded additional facts, covering different years, based on books and records not obtained by another shareholder plaintiff in an earlier dismissed action. 2015 WL 2455469, at *17-19. The court explained that the question is not whether the exact same facts are pled in both complaints — if that were the test, "collateral estoppel would never apply and the plaintiff could litigate serially by endlessly alleging more factual support for the proposition he chooses to advance." *Id.* at *18. Instead, the question is whether the facts that pertain to an issue are identical — even though only a subset of those facts are pled. *Id.* Here, as in *Asbestos Workers*, that test has been met.

The same books-and-records argument was likewise rejected in *In re MGM Mirage Deriv. Litig.*, 2014 WL 2960449 (D. Nev. June 30, 2014) (applying Nevada law). There, a derivative plaintiff argued:

> [T]he facts supporting the demand futility issue brought in [other shareholders' state court derivative action] are not identical to the facts supporting the demand futility issue before this Court because the "state court plaintiffs did not have access to internal MGM documents detailing what the Board knew about the allegations in the Complaint."

Id. at *5 (citation omitted). The court rejected this argument, holding:

> [S]uch access to new information does not raise an *issue* different from the demand futility issue raised in the state court. . . . Plaintiff's possession of additional internal MGM documents is simply irrelevant. Demand futility is the "common issue" in both proceedings.

Id. at *6 (emphasis added) (citation omitted).[19]

That Providence chose to pursue books and records while plaintiffs in *Central Laborers* chose a different information-gathering strategy — namely, interviewing Bernard Madoff in prison — does not alter the fundamental issue in both cases and does not avoid the imposition of collateral estoppel.

CONCLUSION

The Court of Chancery's decision should be affirmed. The Court of Chancery correctly applied the New York law of *res judicata* to preclude Providence from pursuing claims that were adjudicated by the United States District Court for the Southern District of New York. In the alternative, this Court should also affirm dismissal because collateral estoppel precludes plaintiff from again litigating the issue of whether the Board faces a substantial likelihood of liability for failure to implement AML/BSA controls.

[19] *See also Fuchs Family Trust v. Parker Drilling Co.*, 2015 WL 1036106, at *5 (Del. Ch. Mar. 4, 2015) (rejecting shareholder's right to pursue a § 220 demand in order to investigate claims that had already been dismissed with prejudice in a prior shareholder derivative action filed in Texas because any claims based on the § 220 documents would be collateral estopped even if the shareholder obtained books and records).

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CERTIFICATE OF SERVICE

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