

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

IN RE JPMORGAN CHASE & CO.
DERIVATIVE LITIGATION

Master Case No. 1:23-cv-03903-JSR

DERIVATIVE ACTION

**DEFENDANT JAMES E. STALEY'S REPLY MEMORANDUM OF
LAW IN SUPPORT OF MOTION TO DISMISS COMPLAINT**

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Plaintiffs' Opposition asserts that it simply does not matter that JPMorgan has already sued Defendant Jes Staley on the very same claims, and for the very same acts, that are at issue in this derivative action. Of course it does: That the bank is already suing Mr. Staley shows that there is no need for Plaintiffs to do so on its behalf, nor any reason to excuse Plaintiffs' failure to petition the board before filing suit. Indeed, as to both demand futility and the rule against claim splitting, Plaintiffs' only response is that they can pursue the bank's interests *better* than JPMorgan's board. This is a baseless argument, as there is no legal doctrine that permits shareholders to usurp the board's prerogative, and disregard the rules against duplicative litigation, simply on the basis of second-guessing litigation management.

As to the merits of their individual claims, moreover, Plaintiffs fare no better. They suggest that they can state a *Caremark* claim against Mr. Staley based on his alleged knowledge of Jeffrey Epstein's sexual misconduct, as though that somehow equates to knowledge of failed oversight procedures within JPMorgan. It does not. And on the statute of limitations, Plaintiffs rest the survival of their claims entirely on the exceedingly narrow doctrine of equitable tolling (which they did not plead) under Delaware law (which does not apply here). Coupled with Plaintiffs' inability to meet their burden to show demand futility, Plaintiffs' Opposition does nothing to forestall dismissal of the two claims against Mr. Staley (Counts II and III). The Court should therefore grant Mr. Staley's Motion to Dismiss.

I. The Bank's Existing Lawsuit Against Mr. Staley Quashes this Derivative Suit.

The shareholder Plaintiffs do not dispute that nominal defendant JPMorgan—on whose behalf they purport to act—is already suing Jes Staley on the very same claims and theories that they seek to vindicate in this derivative action. *See* Third-Party Compls., *Doe v. JPMorgan*, 1:22-cv-10019-JSR, ECF No. 59; *USVI v. JPMorgan*, 1:22-cv-10904-JSR, ECF No. 130. This

undisputed fact presents two fatal obstacles to Plaintiffs' ability to proceed. Plaintiffs' Opposition does not seriously grapple with, much less rebut, either one.

The first obstacle is, of course, Plaintiffs' need to show demand futility. Having declined to petition JPMorgan's board of directors to bring their contemplated claims against Mr. Staley, Plaintiffs must show that doing so would have been a fool's errand because the board would not sue Mr. Staley on its own because of the legal risk to the board members. But the fact that the very same board has already taken exactly that action—seeking to hold Mr. Staley liable for, among other things, the full \$290 million settlement with the Jane Doe class—is *ipso facto* fatal to Plaintiffs' theory of futility. See, e.g., *In re Delta & Pine Land Co. S'holders Litig.*, 2000 WL 875421, at *6 (Del. Ch. June 21, 2000) (“[T]he existence of a board-initiated action conclusively defeats any claim that demand would have been futile.” (internal citation omitted)).¹

Plaintiffs offer no substantive response to this point, and instead merely disparage JPMorgan's third-party actions as “belated and reactive,” suggesting that they were intended solely to “deflect blame” from the bank, and thus that the bank might settle them “at a non-maximizing price.” Opp'n at 21-22. But Plaintiffs cite no authority suggesting that a court should second-guess board members' motives even *after* they decide to pursue the claims that shareholders said they would not. Quite to the contrary, Delaware law suggests the opposite:

[T]he existence of [a board-initiated suit] conclusively defeats any claim that demand would have been futile. Indeed, there is something to be said for the idea that this Court should inquire no further if it finds that the corporate directors are litigating the same claims advanced in the derivative action.

¹ The *Delta & Pine* decision was no outlier. See, e.g., *Silverzweig v. Unocal Corp.*, 1989 WL 3231, at *4 (Del. Ch. Jan. 19, 1989), *aff'd*, 561 A.2d 993 (1989); *Meyers v. Keeler*, 414 F. Supp. 935, 939 (W.D. Okla. 1976).

Silverzweig, 1989 WL 3231, at *4. Simply put, the demand-futility doctrine is intended to address circumstances in which a supposedly conflicted board would refuse to pursue valid claims. It is not intended to allow shareholders to commandeer and micromanage litigation already underway. In all events, JPMorgan impleaded Mr. Staley less than four months after it was sued, and there can be no doubt that it has vigorously pursued claims against him ever since.²

The second obstacle arises under the rule against claim splitting, i.e., the principle that a plaintiff “must bring in one action all legal theories arising out of the same transaction.” *Am. Stock Exch., LLC v. Mopex, Inc.*, 215 F.R.D. 87, 91 (S.D.N.Y. 2002); accord *Curtis v. Citibank, N.A.*, 226 F.3d 133, 138-39 (2d Cir. 2000). This rule applies here because the very nature of a derivative action is that the plaintiff seeks to vindicate the claims of someone else—in this case, JPMorgan, which is already pursuing the same claims against Mr. Staley in this Court. See *Huck ex rel. Sea Air Shuttle Corp. v. Dawson*, 106 F.3d 45, 50-51 (3d Cir. 1997) (derivative action precluded by prior lawsuit based on similar claims).

Plaintiffs’ response on this point mirrors their response on demand futility, as they argue that the rule against claim-splitting is “discretionary,” and that the Court should decline to apply it here because “the Company cannot be trusted to maximize the value of the claims against Staley.” Opp’n at 25. This is a preposterous assertion: as noted above, no serious observer of the bank’s lawsuit against Mr. Staley would describe it as anything less than hard fought on both sides. Moreover, the rule against claim-splitting is a well-developed concept, with multiple precedential factors to guide judges when applying it. See *Curtis*, 226 F.3d at 138-41. Nowhere among those

² Regarding demand futility more generally, Plaintiffs’ attempts to rewrite their complaint through briefing is as ineffective as it is improper. Mr. Staley refrains from belaboring the dispositive arguments of his codefendants and instead adopts and incorporates by reference their Reply Brief. See ECF No. 34.

factors is the notion that duplicative litigation should be tolerated simply because the driver of a later-filed action questions the bona fides of an earlier one. This Court should not be the first to recognize such a subjective and groundless principle.

II. The Claims Against Mr. Staley Specifically Are Defective.

Plaintiffs' claims against Mr. Staley are substantively deficient even if one overlooks the claim-killing fact of the preexisting JPMorgan lawsuit. Plaintiffs' Opposition attempts to defend these claims on the merits, but fails completely.

A. Plaintiffs Fail To State a Breach-of-Fiduciary Duty Claim Against Mr. Staley.

Count II purports to state a *Caremark* claim, alleging breach of fiduciary duty based on a breakdown of operating controls and corporate compliance functions at JPMorgan. This claim cannot proceed against Mr. Staley because the Complaint is devoid of any allegation that Mr. Staley—who was never a director, merely an officer—ever had responsibility for the compliance and oversight functions where, according to Plaintiffs, JPMorgan fell short.³ This is a fatal deficiency because *Caremark* liability attaches to a corporate officer only when the officer was responsible for receiving and addressing the supposed red flags of misconduct. *In re McDonald's*, 289 A.3d 343, 366 (Del. Ch. 2023) (officer's duty "to identify red flags, report upward, and address them if they fall within the officer's area of responsibility").

Plaintiffs do not dispute Mr. Staley's point that he had no responsibility for the compliance functions. They instead assert that an exception to the "area of responsibility" principle exists—and that a *Caremark* claim can still arise—where the defendant officer has *actual* knowledge of potential corporate wrongdoing, yet fails to act. Or, as the Plaintiffs put it—quoting from the

³ As the Complaint notes, AML and KYC compliance were managed by separate divisions at the bank, as was the filing of SARs. *See* Compl. ¶¶ 5, 147, 151, 181 (referencing, e.g., "compliance department," "risk management division," and "Global Corporate Security Division").

McDonald's decision—“An officer who receives credible information that the corporation is violating the law cannot turn a blind eye and dismiss the issue as ‘not in my area.’” Opp’n at 23 (quoting *id.* at 370).

The problem with Plaintiffs’ reliance on this principle is that their Complaint is, again, devoid of any allegation that Mr. Staley was ever made aware that “the corporation” was “violating the law,” as the rule from *McDonald's* would require. 289 A.3d 369-70. Although the Complaint is replete with (baseless) allegations that Mr. Staley knew of Jeffrey Epstein’s misdeeds,⁴ the actions of a bank’s client do *not* equate to actions of the bank, and only the latter will suffice to state a “Red-Flags” variant of a *Caremark* claim. And there is no allegation that Mr. Staley ever knew, for example, of JPMorgan’s alleged failures to submit SARs about Epstein or of any of the other purported “red flags” indicating a breakdown in the bank’s back-end compliance functions. Indeed, to judge from the Complaint, one could conclude only that Mr. Staley believed that the bank was actively *addressing* Epstein’s suspicious transactions, as the Complaint references multiple discussions he supposedly had with the higher-ups at the bank who bore actual responsibility for compliance. *E.g.*, Compl. ¶¶ 25, 135-37, 181. In other words, regardless of whatever Mr. Staley might have known about Epstein’s personal life, Plaintiffs’ Complaint presents no basis to infer that he knew that *the bank* was falling short in its compliance and external reporting obligations over Epstein’s accounts.

Finally, Plaintiffs get no support from their afterthought citation to JPMorgan’s allegation that “Staley’s act of disloyalty . . . occurred in his primary area of responsibility.” Opp’n at 24. Plaintiffs’ own Complaint makes no such allegation, and, indeed, their Opposition otherwise

⁴ *E.g.*, Opp’n at 24 (noting allegations (i) that Mr. Staley was “tasked with ‘getting to know’ Epstein,” Compl. ¶ 15, and (ii) that another officer was supposed to tell Mr. Staley that the bank was “uncomfortable with Epstein,” *id.* ¶ 18).

denigrates JPMorgan's third-party claims as mere overhead cover to deflect blame away from the bank. *See* Opp'n at 21-22. But more importantly, an entirely conclusory and generalized allegation about Mr. Staley's purported "area of responsibility," devoid of specifics and factual support, is not a premise for *Caremark* liability based on compliance failures.

B. Plaintiffs Fail To State an Unjust Enrichment Claim Against Mr. Staley.

Plaintiffs' unjust enrichment claim against Mr. Staley in Count III fails too. As noted in Mr. Staley's opening brief, the essence of the claim is breach of fiduciary duty, so it suffers from the same faults as Plaintiffs' *Caremark* claim against Mr. Staley in Count II. *See Monroe Cnty. Emps.' Ret. Sys. v. Carlson*, 2010 WL 2376890, at *2 (Del. Ch. June 7, 2010) (dismissing unjust enrichment claim based on deficient fiduciary duty claim).

The unjust enrichment claim is also independently deficient. Such a claim requires, *inter alia*, (i) an express pleading of "the absence of a remedy provided by law," *Nemec v. Shrader*, 991 A.2d 1120, 1130 (Del. 2010) (en banc), and (ii) some form of alleged "enrichment" beyond the defendant's ordinary employment compensation, *see Steinberg v. Dimon*, 2014 WL 3512848, at *4 (S.D.N.Y. July 16, 2014). Here, Plaintiffs' Complaint pleads neither prerequisite. Mr. Staley pointed out these failings in his opening brief (at 17-18), but Plaintiffs' Opposition fails to address them at all. The deficiency of Count III is thus conceded. *See AT & T Corp. v. Syniverse Techs., Inc.*, 2014 WL 4412392, at *7 (S.D.N.Y. Sept. 8, 2014) (unaddressed arguments are conceded).

III. The Claims Against Mr. Staley Are Time-Barred.

Plaintiffs' argument for the timeliness of their lawsuit rests on narrow grounds. *See* Opp'n 24-25. Plaintiffs do not dispute, for example, that Mr. Staley left JPMorgan in 2013—more than a decade ago—or that the applicable New York limitations periods had long since expired by the time they filed suit in May 2023. Nor do Plaintiffs so much as mention the tolling doctrines of fraudulent concealment or inherently unknowable injury. *Id.* Instead, Plaintiffs attempt to salvage

their claim solely through “equitable tolling” under Delaware law—a doctrine that excuses untimeliness by a plaintiff who “reasonably relied” on a fiduciary and was otherwise ignorant of his claim. *Id.* (citing *In re Tyson Foods, Inc.*, 919 A.2d 563, 585 (Del. Ch. 2007)). According to Plaintiffs, this doctrine should apply here, and for support they cite this Court’s denial of the motions to dismiss in the *Doe* and *USVI* actions. This argument fails in every respect.

First, Plaintiffs are simply wrong that Delaware law applies. In New York, forum law governs limitations. As the Second Circuit has observed:

Under New York law[,] the statute of limitations is considered procedural since it goes to the remedy, and New York will apply its own statute of limitations even though the injury which gave rise to the action occurs in another state.

Stafford v. Int’l Harvester Co., 668 F.2d 142, 147 (2d Cir. 1981). This is true even where Delaware law governs the merits under the internal affairs doctrine. *Willensky v. Lederman*, 2015 WL 327843, at *5 n.8 (S.D.N.Y. Jan. 23, 2015) (“[N]o New York court has held that the internal affairs doctrine requires that it apply the *statutes of limitations* of a defendant corporation’s home state.”) (applying New York statute of limitations to shareholder derivative claims). And because New York’s statutes of limitation apply, its law on tolling also applies,⁵ and New York law notably does not recognize the fiduciary-duty-based equitable tolling theory advanced by Plaintiffs.⁶

⁵ *U.S. Bank Nat’l Ass’n as Tr. to Bank of Am., N.A. v. KeyBank, Nat’l Ass’n*, 2023 WL 2745210, at *12 (S.D.N.Y. Mar. 31, 2023) (explaining that New York law governs limitations and also “determines the related questions of what events serve to commence an action and to toll the statute of limitations”) (quoting *Diffley v. Allied-Signal, Inc.*, 921 F.2d 421, 423 (2d Cir. 1990)).

⁶ New York law’s version of equitable tolling applies only where a plaintiff “establish[es] that subsequent and specific actions were taken by defendants, separate from those that provide the factual basis for the underlying cause of action, and that these subsequent actions by defendants somehow kept plaintiff from timely bringing suit.” *De Sole v. Knoedler Gallery, LLC*, 137 F. Supp. 3d 387, 423 (S.D.N.Y. 2015) (cleaned up).

Even if the Court were to apply Delaware tolling law as Plaintiffs urge, their argument would still fail. The background rule in Delaware is that “a claim accrues as soon as the wrongful act occurs,” *Tilden v. Cunningham*, 2018 WL 5307706, at *14 (Del. Ch. Oct. 26, 2018) (citation omitted), not “when the harmful effects of the act are felt—even if the plaintiff is unaware of the wrong,” *In re Coca-Cola Enters., Inc.*, 2007 WL 3122370, at *5 (Del. Ch. Oct. 17, 2007). Although Delaware law recognizes equitable tolling in certain circumstances, a plaintiff seeking refuge under that doctrine bears the burden to plead specific facts showing (i) that he delayed filing due to the fact that he “reasonably relied upon the competence and good faith of a fiduciary,” and (ii) that he was “not on inquiry notice of [his] claims” during the claimed tolling period. *In re Tyson Foods*, 919 A.2d at 585; *In re Dean Witter P’ship Litig.*, 1998 WL 442456, at *6 (Del. Ch. July 17, 1998), *aff’d*, 725 A.2d 441 (Del. 1999).

Plaintiffs, however, plead no such facts. Indeed, the section of their Opposition addressing this argument is devoid of even a single citation to the Complaint. Opp’n at 24-25. And even if Plaintiffs had actually *tried* to plead an equitable tolling theory under Delaware law in their Complaint—which they did not—they certainly could not premise it on a fiduciary relationship *with Mr. Staley*, as any such relationship ended when Mr. Staley left the bank in 2013, well outside any potentially applicable limitations period. Indeed, given that the Miami municipal employees’ pension fund did not purchase JPMorgan common stock until *December 2016* (Compl. ¶ 30), more than three years after Mr. Staley departed, it *never* had a fiduciary relationship with him, much less relied on that relationship.

Finally, it matters not that the Court declined to dismiss JPMorgan’s claims against Mr. Staley in the *Doe* and *USVI* actions. The Court’s bottom-line rulings—based on different pleadings and arguments by the parties—do not control here. While it is true that Mr. Staley’s

motions contained statute-of-limitations arguments, Plaintiffs have offered no comparison of their complaint to the pleadings and allegations that the Court apparently found adequate in the *USVI* and *Doe* suits. Nor did the bank defend untimeliness on equitable-tolling grounds, as Plaintiffs rely on here. And the Court has not yet issued any opinion(s) on the motions to dismiss in those cases, so Plaintiffs have no basis to contend that any rationale for the Court's rulings should also apply here.

CONCLUSION

For the forgoing reasons, and the reasons set forth in Mr. Staley's opening brief (ECF No. 29), the Court should dismiss Counts II and III against Mr. Staley.

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Respectfully submitted,

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