UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE BANK OF AMERICA CORP. SECURITIES, DERIVATIVE, AND EMPLOYMENT RETIREMENT INCOME SECURITY ACT (ERISA) LITIGATION	Master File No. 09 MDL 2058 (DC) ECF CASE
THIS DOCUMENT RELATES TO All Securities Actions	

MEMORANDUM OF LAW IN SUPPORT OF THE BANK DEFENDANTS' MOTION TO CERTIFY A QUESTION OF LAW TO THE DELAWARE SUPREME COURT

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The Bank Defendants respectfully submit this memorandum of law in support of their motion to certify a question of law to the Delaware Supreme Court.[1]

PRELIMINARY STATEMENT

Several recent Court of Appeals decisions that Plaintiffs reference in their supplemental submissions to the Court in opposition to the Bank Defendants' motion to dismiss hold that a federal court, in evaluating whether shareholders have standing to assert a direct claim for damages under a federal statutory provision, should look to the law of the defendant company's state of incorporation. *See generally* Pls.' 2/2/10 Letter.[2] Plaintiffs dispute, however, that Delaware law precludes Bank shareholders in this action from maintaining a direct claim for damages under Section 14(a) of the Securities Exchange Act of 1934. *See* Pls.' 3/10/10 Letter, at 1-3; Pls.' 2/24/10 Letter, at 2-3; Pls.' 2/2/10 Letter, at 1-3; Opp. 67-68.

As set forth in the Bank Defendants' opening and reply briefs in support of their motion to dismiss, the Delaware Supreme Court's decision in *In re J.P. Morgan Chase & Co. Shareholder Litigation*, 906 A.2d 766 (Del. 2006), is squarely on point and mandates dismissal of Plaintiffs' purportedly direct Section 14(a) claims.[3] Just as the Second Circuit recently certified to the Massachusetts Supreme Judicial Court a question that bore on whether shareholders of a Massachusetts business trust have the right to maintain direct claims under the proxy provisions of

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[1] Capitalized terms have the same meaning as in the Bank Defendants' opening and reply memoranda in support of their motion to dismiss Plaintiffs' amended complaint. *See* 11/24/09 Mem. (Docket No. 65); 1/26/10 Reply (Docket No. 165). Exhibits ("Ex.") are attached to the Declaration of S. Christopher Szczerban filed herewith.

[2] In their letter dated February 2, 2010, Plaintiffs expressly directed this Court's attention to two recent appellate decisions that clearly provide that state law governs the issue of whether a federal statutory claim can be brought directly. *See New York City Employees' Ret. Sys.* v. *Jobs*, 593 F.3d 1018, 1022 (9th Cir. 2010) ("The characterization of a [federal statutory] claim as direct or derivative is governed by the law of the state of incorporation."); *Halebian* v. *Berv*, 590 F.3d 195, 204 (2d Cir. 2009) ("Even where an underlying cause of action is based on [a federal statute], . . . whether the action is properly classified as derivative or direct is ordinarily determined by state law."). Despite having submitted these decisions to the Court, Plaintiffs maintain that federal law controls this issue, citing in support of their position five cases which predate *Jobs* and *Halebian* or are otherwise inapposite. *See* Pls.' 3/10/10 Letter, at 2-3; *see also* Reply 6 & n.3 (distinguishing cases).

[3] *See* Mem. 72-73; Reply 3, 5-7; *see also* Supplemental Memorandum in Response to Plaintiffs' February 11 and 24 Letters and in Further Support of the Bank Defendants' Motion to Dismiss, at 15-16, Master File No. 09-2058 (S.D.N.Y. Mar. 8, 2010) (Docket No. 195); Bank Defs.' 2/9/10 Letter, at 2-4, Ex. 1.

the Investment Company Act, *see Halebian* v. *Berv*, 590 F.3d 195, 214-15 (2d Cir. 2009), if this Court concludes that it is uncertain whether applicable Delaware law precludes Plaintiffs from pursuing direct claims for damages under Section 14(a), it should certify the question to the Delaware Supreme Court.

ARGUMENT

I. THE PROPOSED QUESTION FOR CERTIFICATION.

If the Court views the question whether Delaware law requires dismissal here under *J.P. Morgan* to be uncertain, the Bank Defendants respectfully request that this Court certify the following question of law to the Delaware Supreme Court, as authorized by Delaware Supreme Court Rule 41:

> Where a Delaware corporation issues its own shares in a stock-for-stock merger in exchange for shares held by the acquired company's shareholders, do acquiring company shareholders who were allegedly deprived of their right to cast an informed vote on the merger as a result of a materially false or misleading proxy solicitation — but who did not themselves buy, sell or exchange their shares in the merger — have a direct claim under Delaware law against the acquiring corporation and/or its officers or directors to recover damages for the post-merger decline in the market price of the acquiring company's shares when the allegedly misstated or omitted material facts were publicly disclosed?

II. THE PROPOSED QUESTION IS APPROPRIATE FOR CERTIFICATION.

A. This Court has clear authority, under the Delaware Supreme Court Rules, to certify to the Delaware Supreme Court the proposed question for prompt and authoritative resolution.

Pursuant to Rule 41 of the Delaware Supreme Court Rules, a United States District Court may "certify to [the Delaware Supreme] Court for decision a question or questions of law arising in any matter before it prior to the entry of final judgment or decision if there is an important and urgent reason for an immediate determination of such question or questions by [the Delaware Supreme] Court." Del. Sup. Ct. R. 41(a)(ii); *see also* Del. Const. art. IV, § 11(8). The Delaware Supreme Court may, in its discretion, accept certification of such a question so long as the "facts

material to the issue certified" are not in dispute. Del. Sup. Ct. R. 41(b). Thus, this Court is authorized to certify questions of Delaware law to the Delaware Supreme Court — the only Court that can provide definitively correct answers to such questions. Indeed, the Delaware Supreme Court has accepted certification from the United States District Courts on numerous occasions.[4]

The judicial efficiencies to be gained by certifying directly to the Delaware Supreme Court for its expeditious and authoritative determination of Delaware law are underscored by contrasting the inefficiencies that constrain the district courts where uncertain questions of New York law are at issue because of their inability to certify to the New York Court of Appeals. There have been a number of cases where a district court in the Southern District of New York — applying New York law without benefit of the possibility of certification — ruled on New York State law issues; on appeal, the Second Circuit opted to certify the question to the New York Court of Appeals (as it is permitted to do under New York Court of Appeals Rule 500.27(a)); the New York Court of Appeals ultimately answered the question differently than the district court's *Erie* determination; and then the Second Circuit remanded the case to the district court, in some cases ***years*** after the district court issued its initial decision.[5] Had certification been an option for the district courts in those cases, the

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[4] *See, e.g.*, *A.W. Fin. Servs., S.A.* v. *Empire Res., Inc.*, 981 A.2d 1114, 1117 (Del. 2009) (from Southern District of New York); *Waters* v. *United States*, 787 A.2d 71, 71-72 (Del. 2001) (from District of Delaware); *E.I. DuPont de Nemours & Co.* v. *Fla. Evergreen Foliage*, 744 A.2d 457, 458 (Del. 1999) (from Southern District of Florida); *Cont'l Ins. Co.* v. *Burr*, 706 A.2d 499, 499 (Del. 1998) (from District of Delaware); *Potter* v. *Pierce*, 688 A.2d 894, 895 (Del. 1997) (same); *Hoesch* v. *Nat'l R.R. Passenger Corp. (AMTRAK)*, 677 A.2d 29, 30 (Del. 1996) (from Eastern District of Pennsylvania); *United States* v. *Anderson*, 669 A.2d 73, 74 (Del. 1995) (from District of Delaware); *United States* v. *Cumberbatch*, 647 A.2d 1098, 1098 (Del. 1994) (same); *Rales* v. *Blasband*, 626 A.2d 1364, 1365 (Del. 1993) (same); *Richardson* v. *Wile*, 535 A.2d 1346, 1347 (Del. 1988) (same); *Fiat Motors of N. Am., Inc.* v. *Mayor of Wilmington*, 498 A.2d 1062, 1062 (Del. 1985) (same).

[5] *See, e.g.*, *King* v. *Fox*, 2004 WL 68397, at *8 (S.D.N.Y. Jan. 14, 2004), certified to the New York Court of Appeals, *King* v. *Fox*, 418 F.3d 121, 137 (2d Cir. 2005), after determination of question certified by the Second Circuit, *King* v. *Fox*, 7 N.Y.3d 181, 193 (2006), remanded by *King* v. *Fox*, 458 F.3d 39, 40 (2d Cir. 2006); *Prats* v. *Port Auth. of N.Y. & N.J.*, 2001 WL 1218380, at *4-5 (S.D.N.Y. Oct. 12, 2001), certified to the New York Court of Appeals, *Prats* v. *Port Auth. of N.Y. & N.J.*, 315 F.3d 146, 147 (2d Cir. 2002), after determination of question certified by the Second Circuit, *Prats* v. *Port Auth. of N.Y. & N.J.*, 100 N.Y.2d 878, 883 (2003), reversed and remanded by *Prats* v. *Port Auth. of N.Y. & N.J.*, 350 F.3d 58, 59 (2d Cir. 2003); *Great N. Fire Ins. Co.* v. *Mount Vernon Fire Ins. Co.*, 1997 WL 399665, at *1 (S.D.N.Y. July 15, 1997), certified to the New York Court of Appeals, *Great N. Fire Ins. Co.* v. *Mount Vernon Fire Ins. Co.*, 143 F.3d 659, 662 (2d Cir. 1998), after determination of question certified by the Second Circuit, *Great N. Fire Ins. Co.* v. *Mount Vernon Fire Ins. Co.*, 92 N.Y.2d 682, 684 (1999), reversed and remanded by *Great N. Fire Ins. Co.* v. *Mount Vernon Fire Ins. Co.*, 170 F.3d 275, 276-77 (2d Cir. 1999); *Joblon* v. *Solow*, 914 F. Supp. 1044, 1050 (S.D.N.Y. 1996), certified to the New York Court of Appeals, *Joblon* v. *Solow*, 135 F.3d 261, 264 (2d Cir. 1998), after determination of question certified by the Second Circuit, *Joblon* v. *Solow*, 91 N.Y.2d 457,

result would have been to expedite, not — as Plaintiffs suggest (*see* Pls.' 3/10/10 Letter, at 1) — to delay the litigation.

Where, as here, a case involves Delaware law, which ***expressly permits*** certification by the district courts, federal judges — including federal judges in this District — have not hesitated in appropriate cases to certify questions to Delaware's highest court, thereby avoiding the delays that are inherent in New York's certification procedure. Also, the Delaware Supreme Court has willingly accepted issues certified to it to provide the benefit of its role as the definitive arbiter of such Delaware law questions. Indeed, just last year, Judge Stein certified to the Delaware Supreme Court four questions of Delaware law. *See A.W. Fin. Servs., S.A.* v. *Empire Res., Inc.*, 2009 WL 212412, at *1 (S.D.N.Y. Jan. 29, 2009). The Delaware Supreme Court accepted certification and resolved the questions posed by Judge Stein. *See A.W. Fin. Servs., S.A.* v. *Empire Res., Inc.*, 981 A.2d 1114, 1117 (Del. 2009). *See also* n. 4, *supra* (collecting other cases where questions were certified by federal district courts and accepted for resolution by the Delaware Supreme Court).

Further underscoring Delaware's interest in having its Supreme Court act as the arbiter of questions of Delaware law, as well as the unique significance of Delaware corporate law in the federal securities law context, Delaware amended its constitution in 2007 to allow the Delaware Supreme Court to address and resolve questions certified to it by the SEC. 76 Del. Laws, ch. 37, § 1 (2007). *See also* Order Amending Supreme Court Rule 41 (Del. May 15, 2007), Ex. 5.[6]

For precisely this reason — that certification allows federal courts to obtain the benefit of definitive rulings on state law questions by the highest court in the state — certification is a well-

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465-66 (1998), vacated in part and remanded by *Joblon* v. *Solow*, 152 F.3d 55, 58 (2d Cir. 1998); *Encogen Four Partners, L.P.* v. *Niagara Mohawk Power Corp.*, 914 F. Supp. 57, 62-63 (S.D.N.Y. 1996), certified to the New York Court of Appeals, *Norcon Power Partners, L.P.* v. *Niagara Mohawk Power Corp.*, 110 F.3d 6, 9-10 (2d Cir. 1997), after determination of question certified by the Second Circuit, *Norcon Power Partners, L.P.* v. *Niagara Mohawk Power Corp.*, 92 N.Y.2d 458, 468 (1998), reversed and remanded by *Norcon Power Partners, L.P.* v. *Niagara Mohawk Power Corp.*, 163 F.3d 153, 155 (2d Cir. 1998).

[6] As the SEC's General Counsel acknowledged, this amendment reflected the reality that "the administration of the federal securities laws often requires interpretation of state law" and that more than 50% of publicly traded corporations are incorporated in Delaware. *See* Press Release, Delaware Supreme Court, Delaware Constitutional Amendment Enacted Allowing the Securities and Exchange Commission to Bring Questions of Law Directly to the Delaware Supreme Court (May 15, 2007), Ex. 6. And the Delaware Supreme Court "welcome[d] th[e] amendment as responsive to the [SEC's] expressed interest in seeking the Court's advice on corporate issues." *Id.* (quoting Chief Justice Steele). *See also CA, Inc.* v. *AFSCME Employees Pension Plan*, 953 A.2d 227, 229 (Del. 2008) (answering questions certified by the SEC).

accepted mechanism for resolving unsettled questions of state law. Indeed, the United States Supreme Court has long recognized that, to the extent permitted by state statute, certification is a means by which federal courts can save "time, energy and resources" (*Lehman Bros.* v. *Schein*, 416 U.S. 386, 391 (1974)), while simultaneously "increasing the assurance of gaining an authoritative response" to an uncertain question of state law. *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 76 (1997).

The Second Circuit has also repeatedly extolled the benefits of certification, recognizing that certification "is a valuable device for securing prompt and authoritative resolution of unsettled questions of state law." *Regatos* v. *N. Fork Bank*, 396 F.3d 493, 498 (2d Cir. 2005) (quoting *Kidney* v. *Kolmar Labs., Inc.*, 808 F.2d 955, 957 (2d Cir. 1987)). *See also, e.g., Kuhne* v. *Cohen & Slamowitz, LLP*, 579 F.3d 189, 199-200 (2d Cir. 2009) (certifying question to the New York Court of Appeals); *Holmes* v. *Grubman*, 568 F.3d 329, 341 (2d Cir. 2009) (certifying question to the Supreme Court of Georgia); *In re Peaslee*, 547 F.3d 177, 183-87 (2d Cir. 2008) (certifying question to the New York Court of Appeals); *Parrot* v. *Guardian Life Ins. Co. of Am.*, 338 F.3d 140, 144-45 (2d Cir. 2003) (certifying question to the Connecticut Supreme Court); *Israel* v. *State Farm Mut. Auto. Ins. Co.*, 239 F.3d 127, 135-36 (2d Cir. 2000) (same); *Shaw* v. *Agri-Mark, Inc.*, 50 F.3d 117, 120 (2d Cir. 1995) (certifying question to the Delaware Supreme Court).

Indeed, in *Halebian* v. *Berv* (a case upon which Plaintiffs rely, *see* Pls.' 2/2/10 Letter, at 2-3), the Second Circuit recently certified a question to the Massachusetts Supreme Judicial Court that had potential implications for the interpretation under Massachusetts law of a legal issue similar to the one presented here. 590 F.3d at 214-15. The Second Circuit held that, even though the underlying cause of action was based on a federal statute (there, the Investment Company Act), "whether the action [was] properly classified as derivative or direct is ordinarily determined by state law." *Id.* at 204. And while the Court was "unpersuaded" that plaintiffs' claims could be maintained directly (*id.* at 209), it nevertheless concluded that the "more prudent course" would be to reserve judgment on this issue (*i.e.*, whether purportedly direct claims could be maintained as such) until the state court resolved the certified question. *Id.* at 199. Similarly, in *Shaw* v. *Agri-Mark*, the Second Circuit certified to the Delaware Supreme Court a question concerning the existence and scope of

the right under Delaware law to inspect a corporation's books and records — in particular, whether such a right extended to persons who supplied equity capital to a corporation and directly elected its directors, but who were not themselves stockholders of record. 50 F.3d at 120. The Delaware Supreme Court accepted certification and concluded that no such right existed. *Shaw* v. *Agri-Mark, Inc.*, 663 A.2d 464, 464-65 (Del. 1995).

B. Important and urgent reasons exist for an immediate determination by the Delaware Supreme Court of the proposed certified question.

Plaintiffs' contention that certification is warranted under only "exceptional circumstances" (*see* Pls.' 3/10/10 Letter, at 3) is incorrect. Delaware's certification rule makes clear that a federal district court has discretion to certify a question of law so long as there are "important and urgent reasons" for the Delaware Supreme Court to "immediate[ly]" resolve the disputed issue. Del. Sup. Ct. R. 41(a)(ii). As described below, important and urgent reasons exist here.[7] Moreover, the United States Supreme Court has flatly rejected an argument virtually identical to the one Plaintiffs now advance: "[n]ovel, unsettled questions of state law . . . ***not*** 'unique circumstances,' are necessary before federal courts may avail themselves of state certification procedures." *Arizonans for Official English*, 520 U.S. at 174-75 (emphasis added). The District of Connecticut case upon which Plaintiffs purport to rely (*see* Pls.' 3/10/10 Letter, at 3) — which predates the Supreme Court's pronouncement in *Arizonans for Official English* by more than ten years (*see L. Cohen & Co.* v. *Dun & Bradstreet, Inc.*, 629 F. Supp. 1419 (D. Conn. 1986)) — simply cannot be read to limit this Court's discretion to certify the proposed question to the Delaware Supreme Court where the Delaware Supreme Court's own rules support certification.

Accordingly, consistent with Delaware Supreme Court Rule 41 and United States Supreme Court authority, to the extent there is uncertainty as to whether *J.P. Morgan* is controlling in this case, certification is warranted in view of: (1) the importance of the proposed certified question as a

[7] Further underscoring the breadth and flexibility of Delaware's certification rule is the fact that, while the rule offers examples of "important and urgent" reasons for accepting certification, it expressly states that those examples are included for "illustrat[ive]" purposes only and are ***not*** intended to limit the Court's discretion to accept certified questions. Del. Sup. Ct. R. 41(b). The New York rule, by contrast, provides that certification is appropriate only where "no controlling precedent of the Court of Appeals exists" and the question is likely to be "dispositive." N.Y. Ct. App. R. 500.27(a).

matter of Delaware law (underscored by the Delaware Supreme Court's several recent decisions in this area of the law), (2) the capacity for an authoritative determination on this issue to immediately dispose of a major part of Plaintiffs' case, and (3) the potential that such a determination will facilitate the adjudication of future cases in both state and federal court.

First, the proposed certified question implicates an "active" and important area of Delaware law, making the Delaware Supreme Court the most appropriate court to resolve any question with regard to its application. *Runner* v. *N.Y. Stock Exch.*, 568 F.3d 383, 389 (2d Cir. 2009). In a series of recent decisions, the Delaware Supreme Court has expressly addressed and reformulated the appropriate standard for determining whether a shareholder plaintiff may assert a direct claim. In addition to *J.P. Morgan*, *see, e.g.*, *Feldman* v. *Cutaia*, 951 A.2d 727, 732-35 (Del. 2008); *Tooley* v. *Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1035-39 (Del. 2004). Those decisions by the Delaware Supreme Court underscore that State's legitimate and important interest in defining the substantive rights of shareholders of Delaware corporations. *See CTS Corp.* v. *Dynamics Corp. of Am.*, 481 U.S. 69, 91 (1987) ("It . . . is an accepted part of the business landscape in this country for ***States*** to create corporations, to prescribe their powers, and ***to define the rights that are acquired by purchasing their shares***.") (emphasis added); *see also* Verity Winship, *Should New York Courts Hear Certified Questions from the Securities and Exchange Commission?*, 29 Pace L. Rev. 575, 582 (2009) ("Corporate law — more so than many other areas of the law — has traditionally been driven by state law.").

Thus, while the Bank Defendants submit that the Delaware Supreme Court's articulated framework for determining when viable direct claims exist — in particular, *J.P. Morgan*, which the Bank Defendants believe controls the resolution of this case — is clear and requires dismissal of Plaintiffs' Section 14(a) claims, any uncertainty on this issue should be addressed by the Delaware Supreme Court. Not only has the Second Circuit "long recognized that state courts should be accorded the first opportunity to decide significant issues of state law" (*see Parrot*, 338 F.3d at 144), but the Delaware Supreme Court's recent focus and expertise on this subject suggest that it is uniquely well placed to address the proposed certified question. *Cf. Israel*, 239 F.3d at 135-36 (certifying question in view of state's "established preeminence" in the relevant field of law). In

addition, the Second Circuit has indicated that certification may be particularly appropriate where, as here, the outcome of the unanswered question "could affect in a significant way businesses and individual investors in the state." *Holmes*, 568 F.3d at 340; *see also Parrot*, 338 F.3d at 144-45 (certification appropriate where question implicates "important public policy considerations").[8]

Second, the immediate and definitive resolution of this threshold legal issue of whether Plaintiffs' Section 14(a) claims for damages can be asserted directly is potentially dispositive of a significant component of Plaintiffs' case. *See Halebian*, 590 F.3d at 210 (certifying question likely to be determinative of a "claim" in the case); *Runner*, 568 F.3d at 389 (certification appropriate where input from New York Court of Appeals would "likely" resolve litigation). As is apparent from Plaintiffs' opposition brief, the putative Section 14(a) claims are central to Plaintiffs' consolidated amended complaint. *See* Opp. 19-68. If Delaware law precludes Bank shareholders from maintaining their purportedly direct Section 14(a) claims, the claims this Court needs to decide would be significantly narrowed, even in the context of the pending motion to dismiss.[9]

Finally, certification is "especially" "valuable" where resolution of the proposed question is likely "to have significance beyond the interests of the parties in a particular lawsuit." *Regatos*, 396 F.3d at 498. That is the case here. As noted above (*see* n.2, *supra*), *Halebian* confirms that the law of a company's state of incorporation controls whether a claim — even a claim allegedly arising under a federal statute — can be asserted directly by one of its shareholders. 590 F.3d at 204. Given that U.S. public companies are predominantly incorporated under Delaware law, the answer to the proposed certified question is likely to have broad application both in Delaware and in federal courts. *See* Lucian Arye Bebchuk & Alma Cohen, *Firms' Decisions Where to Incorporate*, 46 J.L. & Econ. 383, 390 (2003) (noting that approximately 57% of U.S. public companies are incorporated

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[8] Indeed, the Second Circuit has not hesitated to certify questions of corporate law. *See, e.g.*, *Halebian*, 590 F.3d at 214-15 (certifying to Massachusetts Supreme Judicial Court question whether statute authorizing dismissal of derivative claims applies when a complaint is filed before demand is rejected); *Baker* v. *Health Mgmt. Sys., Inc.*, 264 F.3d 144, 154 (2d Cir. 2001) (seeking clarification from New York Court of Appeals regarding scope of indemnification of corporate officers under the New York Business Corporation Law); *Shaw*, 50 F.3d at 120.

[9] Plaintiffs' assertion that resolution of the proposed certified question would not "narrow the issues" in this litigation because they have brought Section 10(b) claims as well as Section 14(a) claims (*see* Pls.' 3/10/10 Letter, at 3) is incorrect. Among other things, status as a purchaser is required to bring a Rule 10b-5 claim, and a Rule 10b-5 claim requires scienter.

in Delaware). Indeed, even where Delaware law was not directly implicated because the corporation in question was incorporated elsewhere, the federal courts nevertheless have looked to Delaware law for guidance on the issue of a shareholder's standing to sue under Section 14(a) in light of that jurisdiction's well-developed body of corporate law. *See, e.g.*, *New York City Employees' Ret. Sys.* v. *Jobs*, 593 F.3d 1018, 1022 (9th Cir. 2010). Thus, a clear pronouncement by the Delaware Supreme Court would stave off "confusion" and promote the coherent development of Delaware law on this issue — considerations that courts in this Circuit have held militate in favor of certification. *A.W. Fin. Servs.*, 2009 WL 212412, at *4; *see also Shaw*, 50 F.3d at 120 (granting certification and considering prospect that Delaware Supreme Court determination would "guide other courts seeking to apply Delaware law to Delaware corporations"). *Accord Nagy* v. *Riblet Prods. Corp.*, 79 F.3d 572, 577 (7th Cir. 1996) (certification appropriate in view of "nationwide application of Delaware corporate law, and the benefits of making that law more certain").[10]

C. Facts material to the resolution of the proposed certified question are not in dispute.

As noted above, the Delaware Supreme Court has the discretion to accept certified questions where "facts material to the issue certified" are not in dispute. Del. Sup. Ct. R. 41(b). The following facts salient to the resolution of the proposed certified question are undisputed:

- On September 15, 2008, the Bank (a Delaware corporation, *see* AC ¶ 33) announced that it had agreed to acquire Merrill in a stock-for-stock merger. AC ¶¶ 3, 5.
- As Plaintiffs recognize (*see* Opp. 65-68; *see also* AC ¶ 5), under the terms of the Merger Agreement only ***the Bank*** purchased Merrill stock; Bank shareholders did not themselves buy, sell, or exchange their shares in the merger. *See* Merger Agreement §§ 1.4, 2.2-2.3, Ex. 2 (describing the terms of the stock exchange); Proxy at 5, 27, 76, Ex. 2 (same).
- On November 3, 2008, Bank shareholders were issued a Proxy Statement and were asked to vote on "a proposal for approval of the issuance of [Bank] common stock to the stockholders of [Merrill] in the merger." Proxy at 27, Ex. 2.

[10] Given that stock-for-stock mergers are a common acquisition technique — particularly in the financial services industry — the proposed certified question is by no means esoteric or limited to the facts of this case. *See, e.g.*, Wells Fargo & Co., Current Report, Ex. 99.1 (Form 8-K) (Oct. 3, 2008), Ex. 3 (announcing stock-for-stock acquisition of Wachovia); JP Morgan Chase & Co., Current Report, Ex. 99.1 (Form 8-K) (Mar. 17, 2008), Ex. 4 (announcing stock-for-stock acquisition of Bear Stearns). Rather, a definitive response by the Delaware Supreme Court may substantially facilitate the adjudication of future cases arising out of similarly structured transactions.

- Bank shareholders approved the proposal to issue Bank shares in the merger on December 5, 2008, and the merger closed on January 1, 2009. AC ¶¶ 3, 10.
- On September 25, 2009, Plaintiffs filed their Complaint alleging, *inter alia*, that the Proxy Statement contained material misrepresentations and omissions concerning Merrill's 2008 fourth quarter results and bonuses to be paid by Merrill to its employees before the merger closed. AC ¶¶ 328, 331-33.

According to Plaintiffs, as a result of these alleged misrepresentations and omissions, Bank shareholders "were denied the opportunity to make an informed decision in voting on the merger," purportedly giving rise to a direct claim under Section 14(a). AC ¶ 349; *see also* 2/2/10 Pls.' Letter at 1. Plaintiffs seek to recover damages allegedly incurred when the Bank's stock price declined after the merger closed, following disclosure of Merrill's fourth quarter results and the bonuses paid to Merrill employees. AC ¶¶ 261-71, 334.

Notably, the Delaware Supreme Court's decision in *J.P. Morgan*, which addressed the question whether plaintiffs possessed a direct right of action under fundamentally the same circumstances, affirmed the Chancery Court's order granting defendants' motion to dismiss. *See* 906 A.2d at 771. Both *Tooley*, 845 A.2d at 1039, and *Feldman*, 951 A.2d at 731, were also decided at the motion to dismiss stage. Accordingly, resolution of the proposed certified question is both feasible and appropriate at this stage in the litigation.

D. <u>The Bank Defendants' motion to certify is timely.</u>

United States District Courts have the authority to certify questions of law to the Delaware Supreme Court at any time "prior to the entry of final judgment or decision" if "the certifying court . . . has not decided the question or questions" at issue. Del. Sup. Ct. R. 41(a)(ii). It is thus clear that the instant motion complies with the temporal limitations of Delaware's certification rule.

Plaintiffs' assertion that the Bank Defendants' motion is a pretext for "delay[ing] resolution of their motions to dismiss" is simply untrue. Pls.' 3/10/10 Letter, at 1. First, the parties' present disagreement fully crystallized only recently, in light of Plaintiffs' supplemental submission of authorities — including *Halebian*, where the Second Circuit, after full briefing and argument on the merits of the appeal, certified a question to the Massachusetts Supreme Judicial Court and reserved judgment on the remaining issues — confirming that one looks to state law to determine whether a

shareholder's proxy claim may be pursued directly. *See generally* Pls.' 2/2/10 Letter. In short, the issue now is not whether Delaware law applies, but what it requires.

Second, one need only peruse the many cases where the Second Circuit has certified questions of state law to see that questions are ***routinely*** certified after full briefing and even after oral argument. *See, e.g.*, *Halebian*, 590 F.3d at 214-15 (where certification was granted more than nine months after oral argument); *Runner*, 568 F.3d at 389; *Regatos*, 396 F.3d at 498; *Prats*, 315 F.3d at 151; *Great N. Fire Ins. Co.* v. *Mount Vernon Fire Ins. Co.*, 143 F.3d 659, 662 (2d Cir. 1998); *Shaw*, 50 F.3d at 120. Judges in this District have opted to certify questions under similar circumstances. For example, in *A.W. Financial Services*, 2009 WL 212412, at *4-5, Judge Stein certified questions of Delaware law more than five months after defendants filed their reply brief in support of their motion to dismiss the complaint. The Bank Defendants' motion will not, therefore, occasion any inappropriate delay.

III. EVEN IF SHAREHOLDERS WHO WERE ALLEGEDLY DENIED THE RIGHT TO CAST A FULLY INFORMED VOTE MAY HAVE HAD A DIRECT CLAIM TO ENJOIN THE MERGER, THAT DOES NOT MEAN THAT THEY HAVE A DIRECT CLAIM FOR DAMAGES NOW THAT THE MERGER HAS CLOSED.

In their letter of March 10, 2010, Plaintiffs seize on certain language in *J.P. Morgan* for the proposition that the alleged deprivation of the "right to cast an informed vote" gives rise to a direct claim. But the mere fact that shareholders who are allegedly denied the opportunity to cast a fully informed vote may, at some juncture, have a direct claim does not mean that a claim for ***damages*** flows from that right. As the Delaware Supreme Court stated in rejecting a similar contention in *J.P. Morgan*, Plaintiffs' arguments to the contrary simply "conflate[]" the issues of "whether the[ir] proxy disclosure claim is direct" and "whether that disclosure claim, if valid, would entitle [them] to recover compensatory damages." 906 A.2d at 772. Indeed, *J.P. Morgan* — which simultaneously acknowledged that shareholders have a right to exercise a fully informed vote, but nevertheless held that plaintiffs there did not possess a direct claim for damages in connection with that right — makes clear that the alleged deprivation of the right to cast an informed vote does not necessarily give rise

to a direct claim for damages under Delaware law.[11] As the Bank Defendants have consistently argued, Plaintiffs' Section 14(a) claims cannot be maintained directly under the reasoning and holding of *J.P. Morgan* and must be dismissed.

First, after *J.P. Morgan*, there can be no question that plaintiffs must prove that the damages they seek are "logically and reasonably related to the harm or injury for which compensation is being awarded." *Id.* at 773. But, as the Delaware courts have routinely admonished, "the right to cast an informed vote is 'peculiar' and specific and it cannot be adequately quantified or monetized." *In re Transkaryotic Therapies, Inc.*, 954 A.2d 346, 361 (Del. Ch. 2008). In *Transkaryotic Therapies*, the Delaware Chancery Court declined to award damages for alleged disclosure violations in connection with a merger that closed before plaintiffs filed their claims. The Court explained that although

> injunctive relief [may be appropriate] to prevent a vote from taking place where there is a credible threat that shareholders will be asked to vote without . . . complete and accurate information[,] [t]he corollary to this point . . . is that once this irreparable harm has occurred — *i.e.*, when shareholders ***have*** voted without complete and accurate information — it is, by definition, too late to remedy the harm.

Id. (emphasis in original). *See also, e.g., In re Tyson Foods, Inc. Consol. S'holder Litig.*, 919 A.2d 563, 602 & n.113 (Del. Ch. 2007) (noting Delaware Supreme Court's clear mandate that "damages to plaintiff shareholders are limited only to those that arise logically and directly from the lack of disclosure" and dismissing claims for damages based on alleged disclosure violations because "plaintiffs . . . failed to suggest any form of relief that can be granted to them in a direct claim").

Second, it is equally clear that, as a matter of Delaware law, a shareholder asserting a direct claim for damages must be able to show that "he or she can prevail without showing an injury to the corporation." *Tooley*, 845 A.2d at 1039. And here, as in *J.P. Morgan*, the economic harm Plaintiffs do allege to have suffered is "properly regarded as an injury to the corporation, not to the class." 906 A.2d at 770. Plaintiffs' apparent theory is that the Bank's stock price fell once it became evident that, in light of disclosures of, *inter alia*, Merrill's and the Bank's interim results and the

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[11] *St. Clair Shores General Employees Retirement System* v. *Eibeler*, 2008 WL 2941174 (S.D.N.Y. July 30, 2008) — a case upon which Plaintiffs purport to rely (*see* Pls.' 3/10/10 Letter, at 3) — is also illustrative. While acknowledging that "the right to cast an informed vote" might give rise to a direct claim, Judge Kram expressed skepticism (pointing to *J.P. Morgan*) that plaintiff had adequately pleaded its claim for damages based on defendants' alleged disclosure violations and reserved judgment on the issue pending full briefing. *See id.* at *23 & n.17.

bonuses awarded by Merrill to its employees, the Bank had paid too much for Merrill. *See* AC ¶ 333(k); *see also* ¶¶ 194, 333(c) (alleging premium was too high). But any alleged overpayment was made by the Bank alone: Bank shareholders did not buy, sell, or exchange their shares in the merger. That the Bank's share price allegedly declined in response to certain disclosures, and that the stock price decline then impacted shareholders, do not alter this conclusion. As the Second Circuit explained in *Halebian*, a lower stock price "adversely affects [shareholders] merely as they are the owners of the corporate stock; only the corporation itself suffers the direct wrong." 590 F.3d at 205. *See also* Bank Defs.' 2/9/10 Letter, at 3, Ex. 1.

In short, having alleged no quantifiable economic harm logically connected to the alleged deprivation of their right to cast a fully informed vote, or, in fact, ***any*** economic harm distinct from that allegedly incurred by the Bank, Plaintiffs cannot maintain their proxy claims on a direct basis. *See Calamore* v. *Juniper Networks Inc.*, 2010 WL 411138, at *1-2 (9th Cir. Feb. 5, 2010) (dismissing proxy disclosure claim where granting relief requested would not remedy plaintiff's injury and would "impermissibly conflate" plaintiff's claim with a derivative claim).

Finally, in an attempt to obfuscate this threshold standing issue — which the Bank Defendants first raised in their opening brief in support of their motion to dismiss (*see* Mem. 70-74) — Plaintiffs claim in an off-handed manner that "Defendants have not challenged loss causation." Pls.' 3/10/10 Letter, at 3. This is not true. *See* Mem. 74 n.53; *see also* Bank Defs.' 2/9/10 Letter, at 4, Ex. 1.

CONCLUSION

For the reasons set forth above, if the Court views the applicability of *J.P. Morgan* to be uncertain, the Court should certify the proposed question to the Delaware Supreme Court.

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