UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE ALCON SHAREHOLDER LITIGATION	Consolidated Case No. 10 CV 139 (VM)

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION TO RECONSIDER THE COURT'S MAY 24, 2010 ORDER

BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP
Mark Lebovitch
1285 Avenue of the Americas
New York, New York 10019
(212) 554-1400

GRANT & EISENHOFER P.A.
James J. Sabella
485 Lexington Avenue, 29th Floor
New York, New York 10017
(646) 722-8500

BARROWAY TOPAZ KESSLER MELTZER & CHECK, LLP
Lee D. Rudy
280 King of Prussia Road
Radnor, Pennsylvania 19087
(610) 667-7706

LABATON SUCHAROW LLP
Sidney S. Liebesman
140 Broadway
New York, New York 10005
(212) 907-0700

Co-Lead Interim Class Counsel

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Statutes and Rules

Other Authorities

Pursuant to Federal Rules of Civil Procedure 59 and 60 and Local Civil Rule 6.3, Plaintiffs[1] respectfully submit this memorandum in support of their motion to reconsider the Court's May 24, 2010 Decision and Order (the "Order") granting the motion of Defendant Novartis AG ("Novartis") to dismiss Plaintiffs' consolidated class action complaint, filed on January 21, 2010 (the "Complaint"), on grounds of *forum non conveniens*.

I. INTRODUCTION

On May 24, 2010, this Court issued the Order granting the motion of Novartis to dismiss the Complaint on grounds of *forum non conveniens*.[2] Plaintiffs respectfully submit that the Court's recitation of the facts reflects certain errors, the correction of which leads to a different conclusion based on the legal standard the Court applied. Specifically, the Court's recitation of the facts in the Order focused on fiduciary duty claims that had been voluntarily dismissed. Additionally, it appears the Court misconstrued the composition of the public shareholder base of Alcon, 87 percent of which consists of U.S. residents.

This case does not turn on the "internal affairs" of Swiss corporations. Nor does this case involve a global shareholder base with minimal American contacts. To the contrary, this case arises from foreign companies' deliberate sale of billions of dollars of common stock: (i) exclusively on a leading U.S. stock exchange; (ii) to almost exclusively U.S. investors; (iii) by U.S.-based securities underwriting firms and law firms; (iv) through a U.S.-centric "road-show"; (v) based on specific promises contained in U.S. Securities and Exchange Commission ("SEC") filings that the minority investors who purchase these securities will receive specific protections

[1] Plaintiffs are Massachusetts Bricklayers and Masons Trust Funds, Boilermakers Lodge 154 Retirement Plan, Oklahoma Firefighters Pension & Retirement System, City of Westland Police & Fire Retirement System, Erica P. John Fund, Inc. (formerly known as the Archdiocese of Milwaukee Supporting Fund), and City of Monroe Employees' Retirement System.

[2] Novartis was the only defendant in the present action to move to dismiss the Complaint.

against abuse by the majority shareholders that are commonly provided by U.S. companies but not provided in the issuer's home nation.

Plaintiffs submit that U.S. citizens who purchase securities in this context have an overriding interest and valid expectation to have their claim heard by a U.S. court. Moreover, foreign corporations who entice American investment dollars by promising U.S.-style corporate governance protections have no right to refuse to let an American court decide, one way or another, whether those promises are enforceable for the benefit of minority investors.

Plaintiffs respectfully submit that the factual errors contained in the Order arise, in part, from a lack of clarity relating to the import of the April 21, 2010 dismissal by Plaintiffs of the fiduciary duty claims (the "April 21 Voluntary Dismissal"). The April 21 Voluntary Dismissal served two key purposes: first, to moot the jurisdictional arguments in Novartis' motion, Plaintiffs dropped all claims that arise under Swiss corporate law; and second, to avoid any argument about ripeness of claims challenging Novartis' planned squeeze-out merger of Alcon Inc.'s ("Al con") minority public shareholders (the "Stock Purchase Transaction"), Plaintiffs dropped those claims, knowing that if relief were granted with respect to the U.S.-based promissory estoppel claim that Plaintiffs had alleged, the Stock Purchase Transaction would not go forward on its current terms and the Court would never be required to apply Swiss corporate fiduciary duty law.

Plaintiffs' dismissal of their fiduciary duty claims through a stipulation and voluntary dismissal as to Novartis, which had not yet answered, as opposed to filing an amended complaint reflecting the revised counts, may have contributed to the Court's confusion. Plaintiffs submit that an amended complaint would have made clear that, upon the dismissal of the fiduciary duty claims, all that remained to litigate in this Court were U.S.-based quasi-contract and contract

claims focusing on the question upon which the outcome for Alcon minority shareholders will truly hinge: whether or not Novartis can squeeze-out Alcon's minority shareholders without getting the approval of the independent director committee (the "Independent Director Committee") of Alcon's board of directors (the "Alcon Board").

Plaintiffs believe that a different outcome follows if the Court reapplies the three-part test from *Norex Petroleum Ltd. v. Access Indus., Inc.*, 416 F.3d 146,154 (2d Cir. 2005), but this time takes into account that: (a) Plaintiffs' only remaining claims are U.S. law quasi-contract and contract claims, not corporate governance claims, and (b) nearly 90 percent of Alcon's public shareholders are U.S. residents. Not only should the Plaintiffs' choice of a U.S. forum be entitled to substantially more deference, but the calculus surrounding the public and private interest considerations is dramatically different. For example, with the clarifications above, there will no longer be any issue with the application of foreign law or questions surrounding the enforceability of a judgment rendered by this Court.

Moreover, certain recently discovered fa cts further highlight the fundamentally U.S. based nature of the squeeze-out. For example, in effectuating the Stock Purchase Transaction, Novartis is utilizing one of its own U.S. subsidiaries, Novartis Capital Corporation, to solicit funds on the U.S. debt markets from U.S. investors with the assistance of U.S. investment banks. *See* Caryn Trokie, *Novartis Capital Corp sets price guidance on $4 bln sale*, Thompson Reuters (March 9,2010) (available at http://www.reuters.com/assets/print?aid=USN0913446220100309) (last visited June 1, 2010). Novartis is guaranteeing the obligations of its U.S. subsidiary in connection with this debt issuance. *Id.* Further, comments by Novartis senior management at a recent Bank of America health care conference highlight the ripeness of this dispute.

The stakes here are clear: if Novartis can ignore the promise upon which American investors bought and held Alcon shares, then Novartis will be able to squeeze out those minority shareholders at a price that is currently equal to $126, as compared with the $180 per share in cash that Novartis is paying Nestlé S.A. ("Nestlé"). At the very least, this Court should hear the U.S. law based-claims of Alcon's minority shareholders, almost all of whom are American investors, on the merits. Plaintiffs therefore respectfully ask the Court to: (a) reconsider the Order, and (b) if needed, permit Plaintiffs to amend the Complaint to (i) more clearly reflect the effect of the April 21 Voluntary Dismissal and (ii) potentially add a U.S. securities law claim against Novartis arising from Novartis' December 2, 2009 false public statements denying any plan to squeeze-out Alcon's minority public shareholders.[3]

II. LEGAL ARGUMENT

A. Standard Governing a Motion to Reconsider

Federal Rule of Civil Procedure 60 provides that on motion and just terms, the Court may relieve a party from a final judgment, order, or proceeding based on mistake, inadvertence, surprise, or excusable neglect. Fed. R. Civ. P. 60 (b)(1). In addition, pursuant to Fed. R. Civ. P. 59(e), a party may move to "alter or amend" a judgment of the Court. *Donoghue v. Casual Male Retail Group, Inc.*, 427 F. Supp. 2d 350, (S.D.N.Y. 2006). In the District Court for the Southern District of New York, Local Civil Rule 6.3 allows a party to move for reconsideration or reargument. *Id.*

[3] The dismissal granted in the Order is conditioned upon defendants Novartis, Alcon and certain Alcon officers and directors agreeing in writing that, in connection with any future litigation in Switzerland arising out of the subject of this action, defendants would (i) accept service of process, (ii) consent to the relevant tribunal's personal jurisdiction over them, (iii) forego any defenses based on statutes of limitations that would not be available in this action, and (iv) satisfy any final judgment rendered by a Swiss court in any such future litigation (collectively, the "Conditions"). *See* Order at 35-36. In letters submitted to the Court by their respective counsel on June 1, 2010, Alcon, Kevin J. Buehler and Cary R. Rayment, each declined to consent to the Conditions. To the extent the Conditions have not been satisfied, it is unclear that a formal reconsideration is necessary. However, in any event, Plaintiffs believe that the Order should be vacated and the Novartis dismissal motion denied so discovery proceeds.

The standards governing motions to alter or amend a judgment under Fed. R. Civ. P. 59(e) and motions for reconsideration or reargument under Local Rule 6.3 are identical. *In re Gildan Activewear, Inc. Securities Litigation*, 2009 U.S. Dist. LEXIS 113393, *6-7 (S.D.N.Y. 2009). "A motion for reconsideration is appropriate where the moving party can point to controlling decisions or data that the court overlooked -- matters, in other words, that might reasonably be expected to alter the conclusion reached by the court." *Lang v. United States*, 2010 U.S. Dist. LEXIS 51324, at *5 (S.D.N.Y. 2010); *see also*, *Shrader v. CSX Transp., Inc.*, 70 F.3d 255, 257 (2d Cir. 1995). The decision whether to grant a motion for reconsideration under Local Rule 6.3 and Fed. R. Civ. P. 59(e) or a motion under Fed. R. Civ. P. 60(b) lies in the sound discretion of the district court. *In re Gildan*, 2009 U.S. Dist. LEXIS at *9.

In order to prevail on a motion for reconsideration, Plaintiffs must demonstrate that the Court overlooked controlling decisions or factual matters that were put before it in the underlying motion. *Commerce Funding Corp. v. Comprehensive Habilitation Servs.*, 233 F.R.D. 355, 360 (S.D.N.Y. 2005); *Shamis v. Ambassador Factors Corp.*, 187 F.R.D. 148, 151, (S.D.N.Y. 1999). *See also Cancel v. Mazzuca,* 2002 U.S. Dist. LEXIS 15201 at *12 (S.D.N.Y. 2002) (quoting *RMED Int'l, Inc. v. Sloan's Supermarkets,* 207 F. Supp. 2d 292, 296 (S.D.N.Y. 2002)). Accordingly, Courts in this District have not hesitated to grant reconsideration motions where the movant "presented facts that were overlooked" in [the] Court's ... Order and which alter the conclusion reached by [the] Court." *Cantone & Co. v. SeaFrigo*, 2010 U.S. Dist. LEXIS 36550, at *10 (S.D.N.Y. 2010); *see also Malasky v. IAC/InterActiveCorp*, 2005 U.S. Dist. LEXIS 3628 (S.D.N.Y. 2005); *Solomon v. Giorgio Armani Corp.*, 2000 U.S. Dist. LEXIS 18879 (S.D.N.Y. 2000). This includes granting reconsideration of a Court Order dismissing an

action based on *forum non conveniens*. *Wiwa v. Royal Dutch Petroleum Co.*, 1999 U.S. Dist. LEXIS 22352, *7-8 (S.D.N.Y. 1999).

As this Court recognized in *RST (2005) Inc. v. Research in Motion Ltd.*, 597 F. Supp. 2d 362 (S.D.N.Y. 2009) (Marrero, J.), a motion for reconsideration may also be granted "to correct a clear error or prevent manifest injustice." *Id.* at 365 (*quoting Virgin Atlantic Airways, Ltd. v. Nat'l Mediation Board*, 956 F.2d 1245, 1255 (2d Cir. 1992)). In fact, even where a Plaintiff fails to point to any law or facts that the court overlooked, courts in this District have, nevertheless, granted reconsideration motions to "prevent manifest injustice." *See Mikol v. Barnhart*, 554 F. Supp. 2d 498, 502-503 (S.D.N.Y. 2008); *Henderson v. Metro. Bank & Trust Co.*, 502 F. Supp. 2d 372, 379 (S.D.N.Y. 2007) (granting reconsideration of an order granting *forum non conveniens* dismissal and proceeding to deny the motion to dismiss, even though the plaintiff relied on new evidence in the reconsideration motion.

Pursuant to the relevant legal standards outlined above, reconsideration of the Order is warranted. In particular, the following facts, critical to any analysis of a motion to dismiss on grounds of *forum non conveniens*, should be reassessed by the Court: (1) Plaintiffs have dismissed all fiduciary duty and corporate governance claims from the present action and their remaining claims are based solely on U.S. law-based quasi-contract and contract principles; (2) the overwhelming majority of Alcon's minority public shareholders are located in the U.S. and not "all over the world"; (3) Plaintiffs' claims are ripe for adjudication as they have dismissed their fiduciary duty and money damage claims and seek merely injunctive and declaratory relief; and, (4) as recently as December 2, 2009, Novartis indicated that its "position hasn't changed. There are no plans regarding the minority shareholders", suggesting that the Stock Purchase Transaction was not "long contemplated," as the Court had stated in the Order.

B. Plaintiffs Do Not Assert Any Corporate Governance Claims

The Order repeatedly characterizes Plaintiffs' claims as "corporate governance challenges."[4] Plaintiffs have not asserted that any corporate governance-related claim arising in connection with the Stock Purchase Transaction should be decided by this Court. In fact, Plaintiffs dismissed all such claims from the present action pursuant to the April 21 Voluntary Dismissal, a fact that was conveyed to Novartis.[5] Plaintiffs' remaining claims are based solely on U.S. quasi-contract and contract principles. Plaintiffs' U.S. law-based claims arise from a promise made: (a) in Alcon's Form 20-Fs filed with the SEC, (b) prepared by Alcon with the help of its U.S. lawyers and investment bankers (c) when Alcon was seeking to sell its securities

---

[4] Throughout the Order, the Court describes Plaintiffs' claims as corporate governance-related, notwithstanding the April 21 Voluntary Dismissal of the corporate law-based claims. We note the following statements contained in the Order:

- "Upon review of the parties' evidentiary submissions, the Court finds that Plaintiffs' claims, at their core, ***challenge a Swiss transaction governed by Swiss law***." Order at 12. (emphasis added).

- "Because the core events, operative facts, ***applicable law***, and associated public policy interests ***at issue are predominantly local to Switzerland***, the Court agrees with Novartis and finds that the dispute should be resolved in Switzerland." Order at 24. (emphasis added).

- "[t]he predominant public policy interest here is that of Switzerland, ***whose corporations and corporate governance law are at issue***." Order at 25-26. (emphasis added).

- "Prudence cautions otherwise, both so as to avoid overreaching, and to avert the unnecessary globalization of this Court's jurisdiction that would occur ***if the mere trading of stock on the NYSE would expose foreign businesses to corporate governance challenges in this Court***..." Order at 32. (emphasis added).

[5] In footnote 3 of the Order, the Court acknowledges Plaintiffs' voluntary dismissal of their breach of fiduciary duty claims against Alcon, but the Court notes that such dismissal was never stipulated to by Novartis and therefore such claims remain operative against Novartis for the purposes of this motion to dismiss. Plaintiffs' failure to have Novartis execute the stipulation was a reflection of Federal Rule of Civil Procedure 41(a)(i)(A), which allowed a unilateral dismissal before Novartis filed its answer. In the event that Plaintiffs' reliance on that Rule was misplaced, Novartis' own reply brief shows that it appreciated that Plaintiffs' intent was to eliminate all fiduciary claims from the present action. *See* Novartis AG's Reply Memorandum of Law in Further Support of its Motion to Dismiss on Grounds of *Forum Non Conveniens*, dated May 10, 2010 at 1 ("plaintiffs responded to Novartis AG's *forum non conveniens* motion by dropping their fiduciary duty claims...").

on a U.S. stock exchange (d) to U.S. investors. Accordingly, Plaintiffs no longer make any "corporate governance challenges" in this Action, but instead bring claims related to the promises made to Alcon's investors in Alcon's SEC filings.

The Order states that "no NYSE securities transaction underpins Plaintiffs' requests for prospective relief." Order at 12. Plaintiffs' quasi-contract and contract claims, however, are related to the purchase of Alcon shares on the NYSE in reliance on the protections promised in Alcon's soliciting materials. The promise to investors that no merger, takeover, business combination or related-party transaction of Alcon with the Majority Shareholder would be approved by the Alcon Board without the prior approval of the Independent Director Committee was and remains material. Without this promise, U.S. shareholders would either have not purchased shares of Alcon or would have purchased the shares at a substantially lower price.[6]

Additionally, because Plaintiffs assert U.S. law-based contract and quasi-contact claims, not corporate governance claims, it is irrelevant that Alcon's Form 20-Fs state that "***any challenges to actions of the board of directors*** would be governed by Swiss law and would have to be brought in a Swiss court." Order at 13. (emphasis added). Plaintiffs' claims do not seek to challenge any "actions of the board of directors." Plaintiffs merely seek to enforce a binding promise included in the materials used to induce Plaintiffs to purchase Alcon shares. By obtaining a declaration of the rights of Alcon shareholders in light of the promises made to them in the U.S., the Court will simply let Novartis and the Alcon Board know the ***contract or quasi-contract***-based consequences of using their corporate authority in a certain manner. The Court's reliance on this provision in the Form 20-Fs also overlooked that the Form 20-Fs were filed by

[6] Although Novartis' defenses on the merits are plainly premature, Plaintiffs are prepared to establish the materiality of the promise and establish a basis to infer reliance through fact and, if needed, expert testimony.

Alcon, not ***Novartis***. Novartis can hardly hide behind this provision, particularly since Alcon has not challenged that this Court is the proper forum for this controversy to be heard.

Moreover, because Plaintiffs have dropped their fiduciary duty claims, the provision of the Swiss Federal Act barring the recognition of foreign decisions based on Swiss corporate law is wholly inapplicable. *See* Order at 28-30. Plaintiffs' claims are solely based on U.S. quasi-contract and contract principles. Thus, the Court should have no issues with enforcing a judgment rendered by a U.S. court resolving a case exclusively focused on U.S. law that was initiated by U.S. plaintiffs on behalf of a class overwhelmingly comprised of U.S. shareholders.

C. The Overwhelming Majority of Alcon Shareholders Are Located in the U.S.

Plaintiffs respectfully submit that the Court's deference and public interest analysis were influenced by an incorrect assessment of Alcon's share ownership. The Order describes Alcon's minority public shareholders as being "located all over the world" and characterizes the action as "entailing alleged losses suffered ... predominantly in a foreign country." Order at 7. Both of these statements are factually incorrect. Alcon has three shareholders groups: (a) Novartis, which owns 25 percent of Alcon's common stock, (b) Nestlé, which owns 52 percent, and (c) the minority public shareholders, who own the remaining 23 percent. Alcon's minority public shareholders are not scattered throughout the world. The overwhelming majority of these shareholders are concentrated in the U.S., with 87 percent of Alcon's minority shares being owned by U.S. residents. Moreover, 100 percent of Alcon's stockholders purchased their stock on the NYSE.

This case does not represent an instance in which "losses are suffered predominantly in a foreign country." It is exactly the opposite – the losses resulting from Novartis' refusal to respect the promised Independent Director Committee process are being suffered overwhelming by U.S. residents and almost entirely in the U.S., the country in which Plaintiffs have initiated

this action. The Court should not force a class comprised entirely of stockholders who purchased their shares in New York, almost all of whom are residents of the United States, to go to a foreign country to assert U.S. law-based promissory estoppel and contract claims.

These facts appear to have been overlooked or misinterpreted in the Court's initial analysis of the *forum non conveniens* issue.[7] Given a proper analysis of these facts and reconsideration of the Order, it is respectfully submitted that the Court should come to a different conclusion.

---

[7] The opinions cited in the Order are indicative of the Court having overlooked or misinterpreted these key facts. In the Order, the Court relies almost exclusively on case law devoid of U.S.-based plaintiffs and/or U.S. law-based claims. *See Steward Int'l Enhanced Index Fund v. Carr*, 2010 WL 336276, *33-34 (D.N.J. Jan. 22, 2010) (plaintiffs' claims arose exclusively under U.K. corporate law); *Piper Aircraft v. Reyno*, 454 U.S. 235, 260 (1981) (all potential plaintiffs are either Scottish or English); *Monegasque De Reassurances S.A.M. v. Nak Naftogaz of Ukr.*, 311 F.3d 488, 500 (2d Cir. 2002) (petitioner is a citizen of Monaco, respondents are the State of Ukraine and a citizen of Ukraine; parties to the relevant contract are citizens of Russia and Ukraine, and relevant arbitral award was made by a court in Moscow, affirmed by Moscow City Court and the Supreme Court of the Russian Federation); *Turedi v. Coca Cola Co.*, 460 F. Supp. 2d 507, 527 (S.D.N.Y. 2006) (plaintiffs all residents of Turkey); *LaSala v. UBS, AG*, 510 F. Supp. 2d 213, 220 (S.D.N.Y. 2007) (plaintiff asserts claims against a Swiss defendant for (i) aiding and abetting a breach of fiduciary duty and (ii) a Swiss tort claim based upon violations of Swiss statutory law); *Corporacion Tim S.A. v. Schumacher*, 418 F. Supp. 2d 529, 535-536 (S.D.N.Y. 2006) (plaintiffs are corporation based in the Dominican Republic and a German resident; substantive law governing interpretation of the relevant agreements and underlying property interests is that of the Dominican Republic); *Carey v. Bayerische Hypo-Und Vereinsbank AG,* 370 F.3d 234, 238 (2nd Cir. 2004)(dispute over the complex terms of an investment in German real estate which plaintiff voluntarily entered into while living in Germany); *do Rosario Veiga v. World Meteorological Organisation*, 486 F. Supp. 2d 297, 300, 307 (S.D.N.Y. 2007) (plaintiff is citizen of Portugal and Italy and resided in Switzerland at the time the events in question occurred, and Swiss law would govern duties, immunities, and liabilities of defendant); *Blanco v. Banco Indus. De Venezuela, S.A.*, 997 F.2d 974, 983(2nd Cir. 1993) (noting absence of any United States parties or interests in the litigation and finding that the district court was entitled to conclude that questions of Venezuelan substantive and procedural law are better addressed by Venezuelan courts); *Aguinda v. Texaco, Inc.* 303 F.3d 470, 473 (2nd Cir. 2002) (plaintiffs are residents of Ecuador and Peru, respectively); *BlackRock, Inc. v. Schroders PLC*, 2007 U.S. Dist. LEXIS 39279, *31 (S.D.N.Y. 2007)(case implicates issues of German competition law, German employment law, and German privacy law, which is clearly of interest to Germany); *Potomac Capital Inv. Corp. v. KLM Royal Dutch Airlines*, 1998 U.S. Dist. LEXIS 2343, *34 (S.D.N.Y. 1998)(the Netherlands has an interest in adjudicating a negligent repair claim against one of its major corporations arising from activities and facilities in the Netherlands); *Van Der Velde ex rel. Van Der Velde v. Philip Morris Inc.*, 2004 U.S. Dist. LEXIS 246, *1, 24 (S.D.N.Y. 2004)(plaintiff brings suit to recover for injury and death of decedent, a life-long citizen and resident of England, and England's regulatory scheme and the location of relevant events dictate that English law applies); *Saud v. PIA Invs., Ltd.*, 2007 U.S. Dist. LEXIS 92119, *1, 13 (S.D.N.Y. 2007)(plaintiff is a citizen of Saudi Arabia and British Virgin Islands law applies as defendant's articles of association exist under B.V.I. law, and a B.V.I. statute gives rise to right of redemption plaintiff claims was wrongly used against him); *Blimpie Int'l v. ICA Menyforetagen AB*, 1997 U.S. Dist. LEXIS 3950 , *29 (S.D.N.Y. 1997)(Swedish law would have to be applied to most, if not all, of the claims in the case); *Crosstown Songs U.K., Ltd. v. Spirit Music Group, Inc.*, 513 F. Supp. 2d 13, 17 (S.D.N.Y. 2007) ("plaintiffs have not alleged that the United States has a specific interest in the litigation of this suit in a U.S. court, such as the enforcement of U.S. laws").

D. Plaintiffs' Claims are Ripe for Adjudication

The Court's Order also rested in part on its view that Plaintiffs' claims are "not presently ripe for adjudication." Order at n.5. Plaintiffs concede that money damage claims stemming from the Stock Purchase Transaction are not yet ripe. However, Plaintiffs dropped the fiduciary duty and money damage claims[8] because, as long as the Independent Director Committee is given the opportunity to exercise the negotiation rights that were promised to Alcon's shareholders, there is no chance that the Stock Purchase Transaction will close on its current terms. Indeed, after dismissing the fiduciary duty claims, the only remedies that Plaintiffs now seek are injunctive and declaratory relief, and these claims are ripe. Moreover, if the Court grants Plaintiffs' request for injunctive relief and directs Novartis to respect the Independent Director Committee process, neither this Court nor a Swiss court will be forced to decide any money damage claims or corporate governance claims.

Recent statements by Novartis' Chief Financial Officer Jon Symonds ("Symonds") at the Bank of America Merrill Lynch's 2010 Health Care Conference make clear that Novartis takes the position that once it acquires Nestlé's shares, it can close the Stock Purchase Transaction without concern for the Independent Director Committee process. At the Bank of America conference, Symonds stated, "[w]ith our 77% ownership and the rights attributable to 77% ownership, what we can or can't do with the IDC and what their role in that environment is where there are some different legal interpretations." If the IDC process is a binding obligation, as Plaintiffs and the Independent Director Committee vehemently assert, then Novartis must comply with the process whether or not, as a matter of Swiss corporate law, Novartis would be

[8] The Court erroneously notes "[h]ere, Plaintiffs seek relief not for alleged wrongs committed and losses incurred, but a prospective remedy under U.S. law to halt a corporate transaction formulated under Swiss law but not yet consummated, ***and to determine monetary damages that have not yet accrued.***" Order at 8. (emphasis added).

able to close the transaction unilaterally and without submitting the transaction to approval by the Independent Director Committee or the minority shareholders.

Symonds' statement indicates that Novartis intends not to comply with the Independent Director Committee process, providing further evidence that Plaintiffs' claims for declaratory and injunctive relief are ripe for adjudication. In this regard, according to Novartis itself, once it closes the acquisition of Nestlé's shares as early as late July or August of this summer, Novartis will have the ability to close the squeeze-out merger in as little as 30 to 45 days. *See* Novartis' Letter to the Court, dated May 13, 2010 at 2. Pre-closing relief is essential, as the harm from closing the transaction and this Court's refusal to hear the claims of U.S. investors is irreparable.

E. The Stock Purchase Transaction Was Not "Long-Contemplated"

The Court appeared reluctant to allow this case to proceed to a hearing on the merits because Plaintiffs "ask this Court to intervene in a ***long-contemplated***, and ***laboriously planned***, corporate union." Order at 8. (emphasis added). If, however, Novartis is taken at its word, the Stock Purchase Transaction was neither "long-contemplated" nor "laboriously planned." As recently as December 2, 2009 (barely a month before the deal was publicly announced), Eric Althoff, a spokesman for Novartis said, "[o]ur position hasn't changed. There are no plans regarding the minority shareholders."[9] Phil Serafino, *Alcon gains as UBS analyst says Novartis to buy stock*, Bloomberg (December 2, 2009). It is difficult to describe a transaction that has been pulled together in one month as "long-contemplated" or "laboriously planned." Plaintiffs concede that Novartis' lawyers cleverly structured the transaction in an attempt to thread the needle of Swiss and U.S. law and squeeze out the minority shareholders for grossly inadequate

[9] Novartis' December 2, 2009 statement that "there are no plans regarding the minority shareholders" was made in the shadow of a UBS research analyst report predicting that Novartis could pay a squeeze-out price well above $200 per share. This statement, which tempered a run in Alcon's stock price, is either (a) true and the Stock

consideration. Ultimately, whether Novartis hatched its scheme in three weeks or three years before its public offer on January 4, 2010, should not be relevant on a motion to dismiss on the grounds of *forum non conveniens*.

III. CONCLUSION

As detailed above, Plaintiffs respectfully submit that the Court's recitation of the facts reflects certain errors, the correction of which leads to a different conclusion based on the legal standard the Court applied. Plaintiffs have also identified additional facts that may warrant altering the Court's Order. Accordingly, Plaintiffs respectfully request that the Court reconsider the Order and permit Plaintiffs to amend the Complaint so that a class of predominantly U.S. residents is not required to litigate their exclusively U.S. law-based quasi-contract and contract claims in a foreign court.

Date: June 1, 2010

BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP

Mark Lebovitch

Mark Lebovitch
1285 Avenue of the Americas
New York, New York 10019
Telephone: (212) 554-1400
Fax: *(212) 554-1444*

Co-Lead Interim Class Counsel

Purchase Transaction was neither "long-contemplated" nor "laboriously planned" or (b) false and Plaintiffs likely have an actionable claim against Novartis for violation of the federal securities laws.

BARROWAY TOPAZ KESSLER MELTZER & CHECK, LLP
Lee D. Rudy
280 King of Prussia Road
Radnor, Pennsylvania 19087
Telephone: (610) 667-7706
Fax: (610) 667-7056

Co-Lead Interim Class Counsel

LABATON SUCHAROW LLP
Sidney S. Liebesman
140 Broadway
New York, New York 10005
Telephone: (212) 907-0700
Fax: (212) 818-0477

Co-Lead Interim Class Counsel

GRANT & EISENHOFER P.A.
James J. Sabella
485 Lexington Avenue, 29th Floor
New York, New York 10017
Telephone: (646) 722-8500
Fax: (646) 722-8501

Co-Lead Interim Class Counsel

KAHN SWICK & FOTI, LLC
Albert M. Myers
206 Covington Street
Madisonville, Louisiana 70447
Telephone: (504) 455-1400
Fax: (504) 455-1498

Chair of Plaintiffs' Executive Committee