UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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In re CONVERIUM HOLDING AG SECURITIES LITIGATION

No. 04 Civ. 7897 (MBM)

(Meyer v. Converium Holding AG, et al.)

This document relates to:
04 Civ. 8038
04 Civ. 8060
04 Civ. 8295
04 Civ. 8994
04 Civ. 9479

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REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF DEFENDANT CONVERIUM HOLDING AG'S AND THE INDIVIDUAL DEFENDANTS' MOTION TO DISMISS THE CONSOLIDATED AMENDED CLASS ACTION COMPLAINT

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TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES .... iii-vi

PRELIMINARY STATEMENT 1

I. PLAINTIFFS' SECURITIES ACT CLAIMS MUST BE DISMISSED. 2

A. Plaintiffs' Securities Act Claims Fail To Plead A Material Misrepresentation Or Omission. 2

1. Plaintiffs Misstate The Pleadings Standards For Securities Act Claims. 2

2. Plaintiffs Do Not Adequately Allege That The Offering Documents Contained Any Material Misrepresentation Or Omission. 5

a. The Complaint does not adequately allege that the Company's Pre-IPO reserves were deficient. 5

b. The Complaint cannot allege any misrepresentation without adequately alleging, which it has not done, that the Defendants knew or believed the reserves were deficient. 8

B. The Complaint Fails To State A Section 12(a)(2) Claim Because Converium Is Not A "Seller" Under That Statute. 9

C. The Securities Act Claims Are Barred By The Statute of Limitations. 13

1. Whether the Reserve Strengthenings in 2002 Placed Plaintiffs On Inquiry Notice Of Their Claims At That Time May Be Decided On This Motion To Dismiss. 13

2. Plaintiffs Were On Inquiry Notice Of Alleged Misstatements Concerning Reserves No Later Than November 2002. 14

a. Converium's 2002 Reserve Strengthenings Were Neither "Minor" Nor "Modest". 14

b. Plaintiffs Have Admitted Being On Notice Of the Alleged Misrepresentations In November 2002. 16

c. Plaintiffs Were Not Relieved Of Their Duty Of Inquiry Because Of Statements By Management. 16

II. THE COMPLAINT FAILS TO STATE A CLAIM UNDER THE EXCHANGE ACT 19

A. The Complaint Fails To Allege That Any Material Misrepresentation or Omission Was Made With Scienter. 19

1. The Complaint Fails to Allege That Converium or the Officer Defendants Had Motive and Opportunity To Commit Fraud. 19

2. The Complaint Fails to Allege that Any Misleading Statement or Omission Involved Conscious Recklessness or Actual Intent. 21

a. Plaintiffs Have Not Adequately Alleged that Defendants Were Directly Informed of Any Material Reserve Deficiency. 21

i. Loss Reserve Studies 21
ii. The Tillinghast Report 22
iii. Post-IPO and 2002 Reserve Development 22
iv. The Alleged Adverse Loss Development in 2003 24
v. Actions Purportedly Taken in 2003 to Hide the Alleged Reserve Deficiency 25
vi. 2004 Developments 27

b. The Officer Defendants Did Not Have Knowledge Of Facts That Directly Contradicted Their Public Statements 27

c. Plaintiffs' Argument That the Officer Defendants Are Deemed to have Knowledge Of Facts Concerning Converium's Loss Reserves Does Not Advance Their Deficient Scienter Allegations. 28

d. The Officer Defendants' Alleged Role In Managing Reserves Does Not Support an Inference of Scienter. 28

e. The "Sheer Size" of the Alleged Reserve Deficiency Does Not Demonstrate Scienter. 29

f. The Existence of Alleged GAAP Violations Does Not Support an Inference of Scienter 29

III. THE COMPLAINT FAILS TO ALLEGE A CONTROLLING PERSON CLAIM AGAINST THE OFFICER DEFENDANTS AND DEFENDANTS COLOMBO, MEHL, FÖRTERER, SCHNYDER, HENDRIX AND PARKER. 30

IV. THE COURT LACKS PERSONAL JURISDICTION OVER CLARKE, COLOMBO, MEHL, FÖRTERER AND SCHNYDER 33

CONCLUSION 37

TABLE OF AUTHORITIES

Cases **Page(s)**

In re Alstom SA Sec. Litig.,
406 F. Supp. 2d 402 (S.D.N.Y 2005)....................3

In re Alstom SA Sec. Litig.,
406 F. Supp. 2d 433 (S.D.N.Y 2005)....................31

In Re America Bank Note Holographics Inc.,
93 F. Supp. 2d 424 (S.D.N.Y. 2005)....................20, 31

Ansari v. New York Univ.,
179 F.R.D. 112 (S.D.N.Y. 1998)....................36

Asahi Metal Indus. Co. v. Superior Ct.,
480 U.S. 102 (1987)....................34, 35

In re Atlas Air Worldwide Holdings, Inc. Sec. Litig.,
324 F. Supp. 2d 474 (S.D.N.Y.)....................27

In re Bayer AG Sec. Litig.,
03 Civ. 1546, 2004 WL 2190357 (S.D.N.Y. Sept. 30, 2004)....................31

Boguslavsky v. Kaplan,
159 F.3d 715 (2d Cir. 1998)....................31

Burstyn v. Worldwide Xceed Group, Inc.,
01 Civ. 1125, 2002 WL 31191741 (S.D.N.Y. Sept. 30, 2002)....................29, 31

CL-Alexanders Laing & Cruickshank v. Goldfeld,
127 F.R.D. 454 (S.D.N.Y. 1989)....................36

Central Laborers Pension Fund v. Merix Corp.,
No. CV04-826-MO, 2005 WL. 2244072 (D. Or. Sept. 15, 2005)....................4

Chill v. GE Co.,
101 F.3d 263 (2d Cir. 1996)....................29

City of Monroe Employees Retirement Sys. V. Bridgestone Corp.,
399 F.3d 651 (6th Cir. 2005)....................34, 35

In re DaimlerChrysler AG Sec. Litig.,
247 F. Supp. 2d 579 (D. Del. 2003)....................33

de la Fuente v. DCI Telecomms., Inc.,
206 F.R.D. 369 (S.D.N.Y. 2002)....................15

Degulis v. LXR Biotechnology, Inc.,
928 F. Supp. 1301 (S.D.N.Y. 1996)....12

Demaria v. Andersen,
153 F. Supp. 2d 300 (S.D.N.Y. 2001)....31

Derensis v. Coopers & Lybrand Chartered Accountants,
930 F. Supp. 1003 (D.N.J. 1996)....34

Dodds v. Cigna Sec., Inc.,
12 F.3d 346 (2d Cir. 1999)....14

Dorchester Investors v. Peak Trends Trust,
99 Civ. 4696, 2003 WL 223466 (S.D.N.Y. Feb. 3, 2003)....11

Ellison v. America Image Motor Co.,
36 F. Supp. 2d 628 (S.D.N.Y. 1999)....31

In re Enter. Mortgage Acceptance Co., LLC, Sec. Litig.,
391 F.3d 401 (2d Cir. 2004)....13, 14

In re Flag Telecom Holdings, Ltd. Sec. Litig.,
352 F. Supp. 2d 429 (S.D.N.Y. 2005)....12

GSC Partners CDO Fund v. Washington,
368 F.3d 228 (3d Cir. 2004)....19

In re Global Crossing, Ltd. Sec. Litig.,
322 F. Supp. 2d 319 (S.D.N.Y. 2004)....29

In re IPO Sec. Litig.,
241 F. Supp. 2d 281 (S.D.N.Y. 2003)....4

In re Indep. Energy Holdings PLC Sec. Litig.,
154 F. Supp. 2d 741 (S.D.N.Y. 2001)....11

Itoba Ltd. v. LEP Group PLC,
930 F. Supp. 36 (D. Conn. 1996)....34

In re JP Morgan Chase Sec. Litig.,
363 F. Supp. 2d 595 (S.D.N.Y. 2005)....3

Kalnit v. Eichler,
264 F.3d 131 (2d Cir. 2001)....19

LC Capital Partners L.P. v. Frontier Ins. Group, Inc.,
318 F.3d 148 (2d Cir. 2003)....13, 17

Landry v. Price Waterhouse Chartered Accountants,
715 F. Supp. 98 (S.D.N.Y. 1989)....34

In re Livent, Inc. Noteholders Sec. Litig.,
151 F. Supp. 2d 371 (S.D.N.Y. 2001)....................31, 32

Melder v. Morris,
27 F.3d 1097 (5th Cir. 1994)....................20

Milman v. Box Hill Sys. Corp.,
72 F. Supp. 2d 220 (S.D.N.Y. 1999)....................11

Mishkin v. Ageloff,
97 Civ. 2690, 1998 WL 651065 (S.D.N.Y. Sept. 23, 1998)....................31

In re NTL, Inc. Sec. Litig.,
347 F. Supp. 2d 15 (S.D.N.Y. 2004)....................27

Newman v. Warnaco Group, Inc.,
335 F.3d 187 (2d Cir. 2003)....................15, 18

In re OPUS360 Corp. Sec. Litig.,
01 Civ. 2938, 2002 WL. 31190157 (S.D.N.Y. Oct. 2, 2002)....................12

Pinter v. Dahl,
486 U.S. 622 (1988)....................10

Rombach v. Chang,
355 F.3d 164 (2d Cir. 2004)....................3

Rothman v. Gregor,
220 F.3d 81 (2d Cir. 2000)....................29

San Leandro Emergency Med. Group Profit Sharing Plan v. Philip Morris Co.,
75 F.3d 801 (2d Cir. 1996)....................20

Shanahan v. Vallat,
03 Civ. 3496, 2004 WL. 2937805 (S.D.N.Y. Dec. 19, 2004)....................31

In re Sotheby's Holdings, Inc.,
00 Civ. 1041, 2000 WL 1234601 (S.D.N.Y. Aug. 31, 2000)....................28

Suez Equity Investors, L.P. v. Toronto-Dominion Bank,
250 F.3d 87(2d Cir. 2001)....................32

In re Van Wagoner Funds, Inc. Sec. Litig.,
382 F. Supp. 2d 1173 (N.D. Cal. 2004)....................4

In re Vivendi Universal, S.A. Sec. Litig.,
381 F. Supp. 2d 158 (S.D.N.Y. 2003)....................10, 11,12

Defendants Converium Holding AG ("Converium" or the "Company") and Dirk Lohmann, Martin Kauer, Richard Smith, Terry G. Clarke, Peter C. Colombo, Georg F. Mehl, Jürgen Förterer, Anton K. Schnyder, Derrell J. Hendrix and George G.C. Parker (collectively, the "Individual Defendants") respectfully submit this reply memorandum of law in further support of their motion pursuant to Rules 12(b)(2) and 12(b)(6) of the Federal Rules of Civil Procedure to dismiss the claims asserted against them in the Consolidated Amended Class Action Complaint (the "Complaint" or "Compl.") on the grounds that it fails to state a claim upon which relief can be granted and the Court lacks personal jurisdiction over defendants Clarke, Colombo, Mehl, Förterer and Schnyder.

PRELIMINARY STATEMENT

In its ninety-two pages, Plaintiffs' Opposition does nothing to effectively refute the deficiencies in each of their claims that are addressed in Defendant Converium Holding A.G.'s and the Individual Defendants' Opening Memorandum. Unable to avoid the fact that their Securities Act claims are based on nothing more than preliminary and outdated conclusions allegedly reached by Tillinghast, Plaintiffs attempt to salvage these claims by asserting that the actuarial consultant's final report -- based upon which it confirmed that Converium's reserves corresponded to its best estimate -- was the product of deception. But this theory is not alleged in the Complaint and Plaintiffs' Opposition does not supply any factual basis for it. The Complaint, in short, fails to allege that the Offering Documents contained any misrepresentation or omission about the Company's reserves. Plaintiffs' Section 12(a)(2) claim against Converium fails for the additional reason that the Complaint does not allege facts showing that the Company was a seller of the securities, had any financial interest in the proceeds of the IPO, or was the vendor's agent. Finally, even if the Securities Act claims were otherwise viable, those claims are

barred by the one-year discovery statute of limitations given the storm warnings that placed Plaintiffs on inquiry notice in November 2002, a fact which they expressly admitted in their submission to this Court in August 2005.

Plaintiffs' Exchange Act claims fare no better. Those claims fail to meet the stringent pleading requirements of the PSLRA. They do not allege with the requisite particularity that any misrepresentation or omission was made with scienter.

The control person claims against the Individual Defendants that Plaintiffs assert under the Securities Act and the Exchange Act also fail. Not only is there no underlying violation of those statutes adequately alleged, Plaintiffs have not even attempted to allege culpable participation as they must.

Finally, Plaintiffs' Opposition does not demonstrate that five of the Individual Defendants who reside outside of the United States have the requisite minimum contacts here or that it would be reasonable for this Court to exercise personal jurisdiction over them.

I. PLAINTIFFS' SECURITIES ACT CLAIMS MUST BE DISMISSED.

A. Plaintiffs' Securities Act Claims Fail To Plead A Material Misrepresentation Or Omission.

1. *Plaintiffs Misstate The Pleadings Standards For Securities Act Claims.*

As shown in Defendants' Opening Memorandum, where a claim for violation of Sections 11 and 12(a)(2) of the Securities Act sounds in fraud, the heightened pleading requirements of Rule 9(b) apply. (Defs.' Mem. at 22-23.) Plaintiffs, in their Opposition, do not dispute this. (Pls.' Opp'n Mem. at 18-19.) Instead, they contend that their Securities Act claims should not be measured against Rule 9's heightened pleading standard because they "explicitly

averred" that those claims "are not premised on fraud." (Id. at 18.) To the extent the Complaint contains the buzzwords for fraud, they continue, it "merely tracks" the language of Sections 11 and 12(a)(2), which does not mean that the Complaint is fraud-based. (Id. at 19.)

None of that is correct.

The courts have consistently held that boilerplate disclaimers that a complaint does not sound in fraud are insufficient to avoid the strictures of Rule 9(b). See, e.g., In re Alstom SA Sec. Litig., 406 F. Supp. 2d 402, 411 (S.D.N.Y. 2005) (claims under sections 11, 12(a)(2), and 15 fraud-based despite disclaimer in Amended Complaint); In re JP Morgan Chase Sec. Litig., 363 F. Supp. 2d 595, 635 (S.D.N.Y. 2005) ("Plaintiffs cannot evade the Rule 9(b) strictures by summarily disclaiming any reliance on a theory of fraud or recklessness"). Accordingly, that the Complaint contains conclusory assertions that Plaintiffs' claims "do not sound in fraud" is simply not enough.

Plaintiffs' argument that the Complaint "merely tracks" the language of the Securities Act is unavailing as well. Much the same argument was made -- and rejected -- in Rombach v. Chang, 355 F.3d 164 (2d Cir. 2004). There, as here, the complaint alleged that the registration statement was "inaccurate *and* misleading;" that it contained "*untrue* statements of material facts;" and that "materially *false* and *misleading* written statements" were issued. (Compare Rombach, 355 F.3d at 172 with Compl. ¶¶ 240, 250, 261, 270.) The Court of Appeals found that such allegations were "classically associated with fraud." 355 F.3d at 172.

Plaintiffs' argument that their Section 11 and 12(a)(2) claims do not sound in fraud rings particularly hollow when the Complaint is considered as a whole. Those claims are based on the same factual allegations that underlie Plaintiffs' claim for securities fraud under

Section 10(b) of the Exchange Act. Although this point was expressly raised in Defendants' Opening Memorandum, Plaintiffs make no effort to refute it or to distinguish the cases on which defendants relied. As those cases teach, where a plaintiff "alleges a 'unified course of fraudulent conduct' and relies on that conduct as the basis of its Securities Act claim, 'the claim is said to be grounded in fraud . . . .'" Central Laborers Pension Fund v. Merix Corp., No. CV04-826-MO, 2005 WL 2244072, at *5 (D. Or. Sept. 15, 2005) (citation omitted); In re Van Wagoner Funds, Inc. Sec. Litig., 382 F. Supp. 2d 1173, 1180 (N.D. Cal. 2004) (same).[1]

Further, by their very nature, Plaintiffs' Securities Act claims require them to prove that Defendants knew the Company's reserves were deficient. As set forth in Defendant's Opening Memorandum and explained more fully below, statements regarding the adequacy of reserves are matters of belief or opinion which are not actionable unless the speaker knew them to be false. (Defs.' Mem. at 28-31.) Because Plaintiffs cannot allege a misrepresentation with respect to the reserves unless they allege that the Defendants knew the disclosures to be inaccurate, Plaintiffs' Securities Act claims are clearly subject to Rule 9(b).

Any doubt about whether the gravamen of the Complaint sounds in fraud is dispelled by the arguments Plaintiffs advance on this motion. Plaintiffs argue that defendants "conceal[ed] a $350 million reserve deficiency in order to complete Converium's initial public

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[1] For these reasons, plaintiffs' authorities are inapposite. In re IPO Sec. Litig., 241 F. Supp. 2d 281 (S.D.N.Y. 2003), for example, was decided before the Court of Appeals rendered its decision in Rombach and is explicitly premised on prior authorities that Rombach overruled. 241 F. Supp. 2d at 338-339. As to Worldcom and WRT Energy, in neither case did plaintiffs allege the same unified course of fraudulent conduct that plaintiffs here rely upon as the basis for both their Section 11 and Section 10(b) claims. See In re Worldcom, Inc. Sec. Litig., 02 Civ. 3288, 03 Civ. 9499, 2004 WL 1435356 (S.D.N.Y. June 28, 2004); In re WRT Energy Sec. Litig., 96 Civ. 3610, 96 Civ. 3611, 2005 WL 323729 (S.D.N.Y. Feb. 9, 2005).

offering." (Pls.' Opp'n Mem. at 6.) This deficiency was supposedly "known" to defendants because Tillinghast issued a "detailed" report that concluded just that. (Id. at 6 (citing Am. Compl. ¶¶ 82, 83).) Rather than reveal the truth to potential investors, defendants purportedly "duped" and "deceived" Tillinghast into revising its estimate. (Id. at 7, 29.) These actions were allegedly "designed to create the impression that Converium was a company that was fully and adequately reserved." (Id. at 24 (quoting Am. Compl. ¶¶ 4, 141).) These arguments have all of the hallmarks of fraud, not the inadvertence classically associated with negligence.

The Securities Act claims must therefore meet the heightened pleading standard of Rule 9(b). This they have not done.

2. ***Plaintiffs Do Not Adequately Allege That The Offering Documents Contained Any Material Misrepresentation Or Omission.***

a. **The Complaint does not adequately allege that the Company's Pre-IPO reserves were deficient.**

As shown in Defendants' Opening Memorandum, Plaintiffs' Securities Act claims are premised entirely on their allegation that the Offering Documents failed to disclose that Converium was under-reserved by $225 million at the time of the IPO. (Compl. ¶ 95.) In making this claim, Plaintiffs do not dispute, as the Offering Documents expressly stated, that the estimation of loss reserves is "an inherently uncertain process." (Bodkin Aff., Ex. 2 at 122.) Plaintiffs' allegation is predicated on information allegedly provided by Tillinghast to Company personnel in April 2001, only shortly after Tillinghast began its work, which purportedly identified a $350 million deficiency at ZRNA as of December 31, 2000. (Compare Compl. ¶ 86 with Compl. ¶ 82.) Notwithstanding this information, the Complaint alleges the Company strengthened ZRNA's reserves by only $125 million prior to the IPO, thus leaving the $225 million undisclosed deficiency. (Compl. ¶¶ 82, 87, 95, 143, 144, 146, 148.) As also

demonstrated in Defendants' Opening Memorandum, however, the Complaint itself and documents that are integral to it make clear that Plaintiffs have not alleged any sound basis on which to conclude that a reserve deficiency existed.

In September 2001, Tillinghast issued a written report in which it estimated that ZRNA's reserves should fall somewhere between $1.478 billion and $1.887 billion, with a best estimate of $1.662 billion. (Bodkin Aff., Ex. 5.) At the time, ZRNA's reserves were well within Tillinghast's range and $162 million below its best estimate. (Id.) After Tillinghast issued its report and before the IPO, ZRNA strengthened its reserves by $125 million, bringing total held reserves to $1.612 billion, which was again well within Tillinghast's range. (See id.; Compl. ¶ 87.) With that reserve strengthening, Tillinghast confirmed for the Company that its reserves corresponded to its best estimate (Bodkin Aff., Ex. 2 at 123) and consented to such disclosure in the Prospectus (Id., Ex. 6). As such, the Prospectus's disclosure that Converium's reserves were "in line" with Tillinghast's range of estimates (Compl. ¶ 144) clearly was accurate, not a material misstatement.[2]

Plaintiffs contend that this argument has "no merit" because it ignores the Complaint's allegations that Tillinghast originally estimated that ZRNA's reserves were deficient by $350 million and that "Tillinghast was duped into abandoning its original conclusion" by Company personnel. (Pls.' Opp'n Mem. at 29.) It also supposedly ignores the Complaint's allegations that Tillinghast's preliminary report was "corroborated by Converium's own actuaries and loss reserve studies." (Id. at 30.) Given those allegations, they say, the fact that

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[2] Significantly, Plaintiffs nowhere allege that Converium's reserves as strengthened were outside the range of even Tillinghast's preliminary draft estimates.

Tillinghast's final report "stated that the reserves were 'in line' with their best estimates only raises a fact issue as for the jury to resolve at trial." (Id. at 29.) These contentions do not salvage the Securities Act claims.

Plaintiffs provide no basis to discredit the final Tillinghast report. Although Plaintiffs now contend that Tillinghast was "duped" into revising its original estimate of the Company's reserve deficiency, the Complaint alleges no such thing. All that the Complaint alleges is that "the pervasive belief at Converium was that the Company had 'pulled a fast one.'" (Compl. ¶ 87.) That vague and conclusory assertion hardly amounts to an allegation that Tillinghast was deceived. Nor does the Complaint or Plaintiffs' Opposition provide any facts that would support an inference that Tillinghast was duped. For example, the Complaint does not allege that Converium withheld relevant information from Tillinghast or that the information it did provide was inaccurate in any respect. In fact, the Complaint does not even allege that Tillinghast made any erroneous actuarial assumptions or committed any other mistake in connection with its final report.

Finally, Plaintiffs' argument that the numbers in Tillinghast's so-called "original" estimate are "corroborated by Converium's own actuaries and loss reserve studies" does not help them either. (Pls.' Opp'n Mem. at 30.) The Complaint provides absolutely no specifics to support these conclusory assertions. The Complaint merely alleges that the Loss Reserve Studies showed a "significant reserve deficiency," a deficiency which is not quantified in any way. (Compl. ¶ 77.) While the Complaint also alleges that Company personnel realized that the policies written for certain years were not sufficiently priced and that, as a consequence, Converium needed to increase its reserves (Id. ¶¶ 70-75), this is hardly corroboration of the Company's alleged fraud. Not only are the pricing of re-insurance and the setting of loss

reserves inherently uncertain, Plaintiffs' allegations are perfectly consistent with the Prospectus's disclosure that Tillinghast identified certain reserve deficiencies and that the Company strengthened its reserves as a result. Nothing in the Complaint alleges that the deficiencies the Company identified on its own were over and above those identified by Tillingast in its final report.

Counts I, II and IV of the Complaint should therefore be dismissed on the grounds that the Offering Documents do not contain a material misrepresentation or omission.

b. The Complaint cannot allege any misrepresentation without adequately alleging, which it has not done, that the Defendants knew or believed the reserves were deficient.

Statements regarding the adequacy of reserves are statements of belief or opinion. (Defs.' Mem. at 28 (citing Delta Holdings, Inc. v. Nat'l Distillers & Chem. Corp., 945 F.2d 1226, 1229 (2d Cir. 1991).) Plaintiffs acknowledge this. (See Pls.' Opp'n Mem. at 31-32.)

For such statements to be actionable, a plaintiff must plead and prove that the speaker knew them to be false. (Defs.' Mem. at 29 (citing Virginia Bankshares, Inc. v. Sandberg, 501 U.S. 1083, 1095-96 (1991)).) Plaintiffs acknowledge this as well. (See Pls.' Opp'n Mem. at 31-32.)

Accordingly, the only issue here is whether the Complaint adequately alleges that defendants knew or believed that the Prospectus's disclosures concerning Converium's reserves were false. The answer is clear: it does not. As shown in Defendants' Opening Memorandum, the Complaint does not allege that Defendants knew or believed that the Company's reserves were not in line with Tillinghast's range of estimates as disclosed in the Offering Documents.

(Defs.' Mem. at 30.) Nor could it in light of the conclusion reached by Tillinghast that the Company's reserves corresponded to Tillinghast's best estimate.

Plaintiffs' Opposition refutes none of this. Instead, it merely refers the Court to two paragraphs of their Complaint -- paragraphs 79 and 105 -- that supposedly supply the critical allegations. (Pls.' Opp'n Mem. at 32.) Neither paragraph does so. For instance, paragraph 79 merely alleges that ZRNA's technical reserve stood at $100 million by the end of 2000. (Compl. ¶ 79.) It does not allege that any deficiency stood uncorrected after the Company subsequently increased reserves by $125 million. (Compl. ¶ 87.) Paragraph 105's shortcomings are equally pronounced. All it says is that the North American reserve deficiency increased by $90 million during the first two quarters of 2002. (Compl. ¶ 105.) That hardly shows that Converium or the Officer Defendants knowingly made false statements regarding Converium's reserves in 2001, the year before. And Plaintiffs have not even attempted to show that the other Director Defendants had knowledge of a reserve deficiency.

In sum, Plaintiffs have not pleaded particularized facts indicating that Converium or any of the Individual Defendants knew the reserves were deficient.

B. The Complaint Fails To State A Section 12(a)(2) Claim Because Converium Is Not A "Seller" Under That Statute.

As set forth in Defendants' Opening Memorandum, Section 12(a)(2) imposes liability on "only the buyer's immediate seller," not the seller's seller, or on persons who actively solicit the purchase motivated at least in part by a desire to serve his own financial interests or those of the securities owner. (Defs.' Mem. at 31 (citing Pinter v. Dahl, 486 U.S. 622, 642 (1988).)

Plaintiffs concede that Converium is not a seller under the first prong of Pinter. (Pls.' Opp'n Mem. at 48-52.) Nevertheless, they maintain that Converium is liable under the second prong. Because a Registration Statement is by definition "a document soliciting the public to acquire securities," they argue, a party who signs a Registration Statement is deemed to have "solicited" a sale. (Id. at 49 (quoting Gustafson v. Alloyd Co., 513 U.S. 561, 574 (1995)).) While they acknowledge that the Complaint is silent on the issue of financial motive, they claim that this does not matter. (See id.) For one thing, they claim, Converium's true motive is a matter best left for discovery. (Id.) For another, although it is "theoretically possible" that Defendants were not motivated by their "own financial interests" in signing the Registration Statement, such a scenario is "highly unlikely." (Id.) Accordingly, Plaintiffs conclude, Converium is liable as a "seller" under Section 12(a)(2).

As Pinter makes clear, however, there can be no liability under Section 12(a)(2) absent a showing that the defendant successfully solicits a securities purchase *out of desire to serve his own financial interests or those of the securities owner.* 486 U.S. at 648. Thus, a complaint that fails to allege this essential element of a Section 12(a)(2) claim is subject to dismissal at the pleadings stage, even against a defendant who has signed registration statement. In re Vivendi Universal, S.A. Sec. Litig., 381 F. Supp. 2d 158, 187 (S.D.N.Y. 2003) (dismissing Section 12(a)(2) claim against CFO who signed a registration statement and solicited plaintiffs' purchases where complaint failed to allege that CFO "stood to financially gain from his actions"). Here, the Complaint makes clear that ZFS, not Converium, received all of the proceeds from the IPO. (Compl. ¶ 91.) Because the Complaint does not allege that Converium stood to gain financially from the offering, no claim under Section 12(a)(2) will lie.

Additionally, as made clear in our Opening Memorandum, an "'issuer may only be liable under Section 12(a)(2) if the plaintiff alleges that an issuer's role was not the usual one; that it went farther and became a vendor's agent.'" (Defs.' Mem. at 32 (quoting Rosenzweig v. Azurix Corp., 332 F.3d 854 (5th Cir. 2003)).) Accordingly, in those cases where the courts have found the allegations of the complaint sufficient to state a claim under Section 12(a)(2), much more is alleged than that defendants have signed the Registration Statement. See, e.g., Dorchester Investors v. Peak Trends Trust, 99 Civ. 4696, 2003 WL 223466, at *2-*3 (S.D.N.Y. Feb. 3, 2003) (alleging that defendant signed registration statement, negotiated and executed the underwriting agreement and had a financial interest in soliciting sales); Vivendi Universal, 381 F. Supp. 2d at 187 (alleging that CEO signed registration statement, participated in its preparation, regularly appeared before investors to tout the company's financial vitality and stood to financially benefit from increased sales); In re Indep. Energy Holdings PLC Sec. Litig., 154 F. Supp. 2d 741, 761 (S.D.N.Y. 2001) (alleging that defendants made or participated in the decision to hire the underwriter, and drafted, disseminated and signed the prospectuses); Milman v. Box Hill Sys. Corp., 72 F. Supp. 2d 220, 230 (S.D.N.Y. 1999) (alleging that defendants received millions of dollar in profits from the offering, that they hired the underwriters and actively promoted the stock through direct participation in the road show).

Plaintiffs cite two cases that they claim show that signing the Registration Statement "is more than sufficient at the pleading stage." (Pls.' Opp'n Mem. at 48-49 (citing In re Flag Telecom Holdings, Ltd. Sec. Litig., 352 F. Supp. 2d 429 (S.D.N.Y. 2005)) and In re OPUS360 Corp. Sec. Litig., 01 Civ. 2938, 2002 WL 31190157 (S.D.N.Y. Oct. 2, 2002)).) Neither decision supports that extreme position.

In OPUS, the Court noted that, while it was "significant" that the officers and directors "signed the registration statement," there were numerous "other allegations" in the complaint that defendants "actively solicited the purchases made by the plaintiffs and were motivated by financial interest." Id., at *10. Further, OPUS itself "stood to obtain millions of dollars" in the IPO. Id. Flag Telecom is inapposite as well. There, the issue was whether the issuer's officers and directors who signed the Registration Statement were sellers within the meaning of Section 12(a)(2). 352 F. Supp. 2d at 454. Plaintiffs did not seek to hold the issuer liable as a seller, as plaintiffs do here.[3] The difference is crucial. Every issuer who goes through an IPO must file a Registration Statement. If the rule were as plaintiffs maintain, every issuer would automatically be subject to liability under Section 12(a)(2), whether it actually solicited sales of securities or not. That, plainly, is not what Congress intended.[4]

Applying the proper standard, it is plain that the Complaint here lacks the necessary allegations. There is no allegation that Converium stood to gain financially if such

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[3] Plaintiffs' Opposition Memorandum asserts that the Individual Defendants are liable as sellers under Section 12(a)(2) as well. (Pls.' Opp'n Mem. at 48-49.) However, the Complaint does not assert Section 12(a)(2) claims against the Individual Defendants. (Compl. Count III.)

[4] Furthermore, the court's holding in Flag Telecom was based on a misconstruction of prior decisional law. The Court relied on Degulis v. LXR Biotechnology, Inc., 928 F. Supp. 1301 (S.D.N.Y. 1996) and In re Vivendi Universal, S.A. Sec. Litig., 381 F. Supp. 2d 158 (S.D.N.Y. 2003) as authority for the proposition that corporate officers who sign a Registration Statement are "deemed, for pleading purposes, to have solicited a purchase" within the meaning of Section 12. 352 F. Supp. 2d at 454. That, however, is not what Degulis or Vivendi holds. Plaintiffs in Degulis did not simply allege that the defendants had signed the Registration Statement. They also alleged that defendants were responsible for the contents and dissemination of the prospectuses, that they each participated in and approved the prospectuses and that they stood to gain personally from the IPO as they held substantial equitable interests in the companies. 928 F. Supp. at 1311. Similarly, in Vivendi, plaintiffs alleged that the CEO and CFO were both liable under Section 12(a)(2) because they signed the registration statement and solicited plaintiffs' purchases. 381 F. Supp. 2d at 187. The court upheld the claim against the CEO because he allegedly actively participated in the preparation of the registration statement, regularly appeared before investors and financial news agencies to tout the Company's financial vitality and stood to gain financially from the IPO. Id. But it dismissed the claim against the CFO -- despite the facts that he too signed the registration statement and actively promoted the IPO -- because there was no allegation that he stood to financially benefit from increased sales. Id.

sales were consummated and that is fatal to Plaintiffs' claim. Nor are there allegations showing that Converium acted as the "vendor's agent" within the meaning of Pinter. Count III of the Amended Complaint should therefore be dismissed.

C. The Securities Act Claims Are Barred By The Statute of Limitations.

In our Opening Memorandum, we showed that Plaintiffs' Securities Act claims should be dismissed as untimely because the four reserve strengthenings in the eleven months following the IPO, totaling $165.9 million, coming as they did on the heels of large reserve strengthenings taken in the months leading up to the IPO, put investors on "inquiry notice" of the matters about which they now complain. Because Plaintiffs did not begin an investigation and did not bring suit until after the one-year discovery statute of limitations expired, their claims are time-barred. As we show below, none of the arguments that Plaintiffs advance in an effort to avoid this result have any merit.

1. *Whether the Reserve Strengthenings in 2002 Placed Plaintiffs On Inquiry Notice Of Their Claims At That Time May Be Decided On This Motion To Dismiss.*

Plaintiffs agree that the one-year statute of limitations for Securities Act claims can be triggered by "storm warnings." (Pls' Opp'n Mem. at 38.) Thus, it is common ground that "when the circumstances would suggest to an investor of ordinary intelligence the probability that she has been defrauded, a duty of inquiry arises." LC Capital Partners L.P. v. Frontier Ins. Group, Inc., 318 F.3d 148, 154 (2d Cir. 2003). Further, while Plaintiffs suggest that whether a plaintiff had sufficient facts to place it on inquiry notice is "often inappropriate" for resolution on a motion to dismiss (see Pls.' Opp'n Mem. at 39), they do not question that the Second Circuit has "done so in 'a vast number of cases'" (LC Capital, 318 F.3d at 156) when, as here, the relevant facts can be "gleaned from the complaint and papers integral" to it. In re Enterprise

Mortgage Acceptance Co., LLC, Sec. Litig., 391 F.3d 401, 411 (2d Cir. 2004); Dodds v. Cigna Sec., Inc., 12 F.3d 346, 352 n.3 (2d Cir. 1999). Dealing with the statute of limitations issue now is clearly warranted given the reserve strengthenings that the Company announced in 2002 and Plaintiffs' admission that these announcements made "partial disclosure" of the alleged fraud which caused them to sell Converium stock.

2. *Plaintiffs Were On Inquiry Notice Of Alleged Misstatements Concerning Reserves No Later Than November 2002.*

a. **Converium's 2002 Reserve Strengthenings Were Neither "Minor" Nor "Modest".**

Plaintiffs attempt to avoid the statute of limitations bar by claiming that the 2002 reserve increases were "minor" or "modest" and therefore did not trigger a duty to inquire. (Pls.' Opp'n Mem. at 40-41.) In making this argument, they attempt to distinguish the 2002 reserve strengthenings from the reserve strengthening announced on July 20, 2004 which they contend disclosed that "Converium was under-reserved by hundreds of millions of dollars." (Pls.' Opp'n Mem. at 37.) But the fact that 2004 reserve strengthening was larger hardly means that the 2002 reserve strengthenings were minor or modest. The strengthenings announced in 2002 were obviously substantial in amount and resulted in a dramatic decline in the Company's stock price as well as rating agency downgrades.

The December 2001 Offering Documents disclosed that Converium had strengthened reserves in 2000 and 2001 by approximately $177 million. (See Bodkin Aff., Ex. 2 at F-23, 123.) Plaintiffs, of course, allege that even after these reserve increases, the Company's reserves were still deficient by $225 million, a number that the Complaint characterizes as "massive." (See Compl. ¶¶ 84, 95.) Plaintiffs do not dispute that in the eleven months following the IPO the Company announced no fewer than four more reserve strengthenings, which totaled

$165.9 million.[5] These strengthenings amounted to almost seventy five percent of the $225 million alleged reserve deficiency Plaintiffs claim existed at the time of the IPO, a comparison we pointed out in our Opening Memorandum and which Plaintiffs neither address nor dispute in their Opposition. (Defs.' Mem. at 36.) In fact these reserve strengthenings amounted to almost forty percent of the reserve increase that Converium announced in July 2004 which Plaintiffs claim "shocked the market." (Pls.' Opp'n Mem. at 13.)

As demonstrated in Defendants' Opening Memorandum, the market did not ignore the Company's October 28, 2002 press release. As the Complaint alleges, it "caused the price of Converium's stock and ADSs to fall dramatically." (Compl. ¶ 158.) Plaintiffs do not and cannot dispute that such a price drop after the disclosure of storm warnings supports a finding that inquiry notice was triggered. (See Defs.' Mem. at 36-37); see also Newman v. Warnaco Group, Inc., 335 F.3d 187, 195 (2d Cir. 2003); de la Fuente v. DCI Telecomms., Inc., 206 F.R.D. 369, 382 (S.D.N.Y. 2002). Converium also took a beating at the hands of the rating agencies, with Moody's, Fitch, and Standard & Poor's downgrading their outlooks for the Company to negative (Bodkin Aff., Exs. 11-13), a fact that further bolsters the conclusion that Plaintiffs were on inquiry notice. (See Defs.' Mem. at 37.) Plaintiffs address none of these facts in their Opposition.

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[5] The amounts announced for Converium's North American subsidiary -- the unit that Plaintiffs now focus on -- were even higher. The Company announced reserve strengthenings of $176.2 million at CRNA in 2002 (i.e., $39.0 million as disclosed in the Company's 2001 Form 20-F; $19.9 million identified in the Half-Year Report; $47 million identified in the October 28, 2002 Form 6-K; and $70.3 million identified on November 19, 2002). (See Bodkin Aff., Exs. 8-10, 20.) Positive developments in other segments reduced this figure to the $165.9 million that was reported on a consolidated basis. (Id.)

b. Plaintiffs Have Admitted Being On Notice Of the Alleged Misrepresentations In November 2002.

As pointed out in our Opening Memorandum, in their August 22, 2005 letter to the Court, Plaintiffs explicitly stated that the October 28, 2002 press release made a "partial disclosure of Converium's true reserve position, which was misrepresented in the registration statement and prospectus." (Defs.' Mem. at 38 (citing Bodkin Aff., Ex. 14 at 2).) As a result of this disclosure, Plaintiff LASERS sold almost 40,000 or one-third of the ADSs that it owned at the time. (Bodkin Aff., Ex. 14 at 2.) By their own admission, then, Plaintiffs had concluded in October 2002 that Converium's IPO disclosures concerning reserves had not been accurate, and that its "true reserve position" was not as represented in the Offering Documents.

Plaintiffs have no answer for this admission and, tellingly, they do not even mention it in their Opposition.

c. Plaintiffs Were Not Relieved Of Their Duty Of Inquiry Because Of Statements By Management.

Ignoring their own admission as to the significance of the Company's October 28, 2002 press release, Plaintiffs attempt to excuse their inaction by arguing that the announcements of the 2002 reserve strengthenings were accompanied by positive assurances from Converium management. Specifically, they contend that Converium management announced its "determination to confront emerging reserve issues in a forthright and proactive manner," and that defendant Lohmann allegedly said that he felt the Company had "turned the corner on the reserve thing." (Pls.' Opp'n Mem. at 41.) These types of expressions of hope, devoid of any specific steps taken to avoid under-reserving in the future, do not excuse Plaintiffs' failure to inquire.

In LC Capital Partners, LP v. Frontier Ins. Group, Inc., 318 F.3d 148 (2d Cir. 2003), the Court of Appeals made clear that statements similar to those Plaintiffs cite here do not excuse a failure to commence inquiry. There, the defendant said "the reserve problem 'is now behind us'" (id. at 155), while here Converium allegedly said "we have turned the corner on the reserve thing." (Compl. ¶ 162.) In language fully applicable here, the court held that such "expressions of hope" did not justify investors' failure to inquire into possible claims:

> Here, all three factors point against the reasonableness of reliance on Frontier's reassurances. Under-reserving is obviously a serious problem for an insurance company. The prospect that the problem would recur was heightened when three substantial reserve charges were taken within four years, indicating the likelihood of either a fundamental defect in the company's reserve methodology or the company's refusal to face reality. The 'reassuring' statements by management were mere expressions of hope, devoid of any specific steps taken to avoid under-reserving in the future. In these circumstances the claimed reassurances are unavailing.

LC Capital, 318 F.3d at 155-56.

The alleged reassuring statements by Converium management do not excuse Plaintiffs' failure to inquire for another reason. Those statements had nothing to do with the reserve numbers included in the Offering Documents. They dealt, instead, with management's belief that "we turned the corner on the reserve thing." But the issue that Plaintiffs faced in November 2002 was whether to commence an inquiry into the disclosures in the Offering Documents concerning the Company's historical reserves, not whether Converium's purported reserving problems were behind it.

Plaintiffs also rely on the fact that "Converium began to report a string of ever-increasing profits, including record income for 2003 and the first quarter of 2004" as a reason why they did not commence an inquiry sooner and they attempt to distinguish LC Capital on that

basis. (Pls.' Opp. Mem. at 42 (emphasis omitted).) But what Plaintiffs fail to address is that Converium's 2003 financial results were not issued until February 2004 (and its first quarter 2004 results until April 2004) (Bodkin Aff., Ex. 18), and by that time the statute of limitations had already run on their Securities Act claims.[6] Further, even if these financial results had been announced soon after the Company's 2002 reserve strengthenings, they would not have affected Plaintiffs' duty to inquire. As noted above, that inquiry concerning Securities Act claims would involve whether the Company's disclosures in the Offering Documents were accurate, not whether the Company's financial results after the IPO were being inflated by the failure to increase reserves appropriately.

* * * * *

In sum, Plaintiffs were on inquiry notice of their Securities Act claims no later than November 2002, no inquiry was begun and no action was brought until the Fall of 2004, and those claims are time-barred as a matter of law.

II. THE COMPLAINT FAILS TO STATE A CLAIM UNDER THE EXCHANGE ACT.

A. The Complaint Fails To Allege That Any Material Misrepresentation or Omission Was Made With Scienter.

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6 Plaintiffs' reliance on Newman is completely misplaced. (Pls.' Opp'n Mem. at 42 (citing Newman, 335 F.3d at 193).) There, the court held that the plaintiffs were not placed on inquiry notice because the purported storm warnings could have been read to indicate that an inventory write-down was attributable to a new Statement of Position from the American Institute of Certified Public Accountants, rather than to matters indicative of fraud. Newman, 335 F.3d at 194. Here, of course, Converium provided no such benign explanation for its need to strengthen historical reserves. Indeed, as noted above, the statements made by Converium management that Plaintiffs characterize as "reassuring" did not relate at all to Converium's historical reserves. In addition, the court in Newman noted that its conclusion was further supported by the fact that Warnaco's stock price did not decline following the alleged storm warnings. Id. at 195. Here, Plaintiffs have admitted that "[d]espite the Company's assurances, the [October 28, 2002] disclosure of the reserve increases sent the price of Converium shares and ADSs tumbling." (Compl. ¶ 164.)

Plaintiffs acknowledge that to state a claim under Section 10(b) of the Exchange Act, they must "state with particularity facts giving rise to a strong inference that defendants acted with" scienter. (Pls.' Opp'n Mem. at 60.) Strong inference can be pleaded "either (a) by alleging facts to show that defendants had both motive and opportunity to commit fraud, or (b) by alleging facts that constitute strong circumstantial evidence of conscious misbehavior or recklessness." Kalnit v. Eichler, 264 F.3d 131, 138 (2d Cir. 2001) (internal quotations omitted). And, of course, scienter cannot be pleaded unless it is connection to a misrepresentation or omission that is adequately alleged. See GSC Partners CDO Fund v. Washington, 368 F.3d 228, 239 (3d Cir. 2004) (dismissing claims where scienter allegations "cannot be connected directly to any misleading statement. . . ."). Here, the Complaint does not adequately allege that any material misrepresentation or omission was made with scienter.

1. *The Complaint Fails to Allege That Converium or the Officer Defendants Had Motive and Opportunity To Commit Fraud.*

"Motives that are generally possessed by most corporate directors and officers do not suffice [to establish a strong inference of scienter]; instead, plaintiffs must assert a concrete and personal benefit to the individual defendants resulting from the fraud." Kalnit, 264 F.3d at 139.

As to Converium, which did not receive any proceeds from the IPO, Plaintiffs' Opposition does not even contend that a motive to commit fraud existed. Similarly, Plaintiffs suggest no legally sufficient motive for the Officer Defendants to commit securities fraud. They do not, for example, assert that the Officer Defendants sold a single share of stock during the class period or received any other concrete and personal financial benefits from the alleged fraud. While Plaintiffs argue that the IPO offered defendants Lohmann and Kauer the promise of an independent company to run and that defendant Smith faced the risk that, if the IPO failed, the

U.S. operations he ran would be wound down[7] (Pls.' Opp'n Mem. at 76), these purported motives are not alleged in the Complaint and, in any event, are not legally sufficient. The desire to have a successful IPO is one shared by virtually all corporate insiders in a similar position and cannot provide the motive necessary to show scienter. See Melder v. Morris, 27 F.3d 1097, 1102 (5th Cir. 1994).[8] Moreover, these legally insufficient assertions in Plaintiffs' Opposition are not accompanied by any particularized supporting facts. Plaintiffs provide no facts showing that the Officer Defendants received any financial benefits from the Converium IPO such as, for example, increased compensation.[9]

Further, Plaintiffs' newly minted contention as to the Officer Defendants' motives is totally at odds with and undermined by other allegations in the Complaint that are central to their case. Thus, Plaintiffs do not and cannot explain how the Officer Defendants could have plausibly been motivated by the promise of running an independent company when they

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7 None of the other Individual Defendants are alleged to have violated Rule 10b-5.

8 Plaintiffs make a puzzling attempt to distinguish Melder on the grounds that the court there held that no motive was alleged because there was no allegation that any of the individual defendants personally profited, whereas "ZFS here obtained a nearly $2 billion windfall from the IPO . . . ." (Pls.' Opp'n Mem. at 78). But neither the Complaint nor Plaintiffs' Opposition provide any basis for imputing ZFS's alleged motives to either Converium or the Officer Defendants, and, just as in *Melder*, the Complaint contains no allegations that either Converium or the Officer Defendants personally profited from the IPO. Plaintiffs also misconstrue the Second Circuit's holding in San Leandro Emergency Medical Group Profit Sharing Plan v. Philip Morris Co., 75 F.3d 801 (2d Cir. 1996). The court there did not rest its holding solely on the fact that not all of the defendants sold stock, as plaintiffs argue, but also rejected the plaintiffs' attempt to allege motive by "alleging that an inflated stock price and an illusion of continued profitability . . . maintained the company's bond or credit ratings at the highest possible level, so as to maximize the marketability of the $700 million of debt securities issued in January and minimize the interest rate on those securities." Id. at 813. These allegations, held insufficient in San Leandro, are much the same as the Complaint's allegations that Converium's and the Officer Defendants' motives were to "inflate the Company's financial results [and] prevent against a downgrade of the Company's credit rating . . . ." (Compl. ¶ 304 (b)-(c).)

9 Plaintiffs' reliance on In Re Am. Bank Note Holographics Inc., 93 F. Supp. 2d 424, 444-445 (S.D.N.Y. 2000) also does nothing to bolster their scienter argument against Converium or the Officer Defendants. That case deals with the benefits a parent corporation received from the sale of stock of a subsidiary in an IPO and has no bearing on the claims against the Converium Defendants.

purportedly knew that Converium faced serious reserve difficulties that adversely impacted the Company's chances of success.

2. *The Complaint Fails to Allege that Any Misleading Statement or Omission Involved Conscious Recklessness or Actual Intent.*

Although Plaintiffs' Opposition acknowledges the PSLRA's stringent pleading standards (Pls.' Opp'n Mem. at 20), it fails to identify particularized facts in the Complaint showing that misleading statements were made or raising a strong inference that any of the defendants acted with scienter.

a. **Plaintiffs Have Not Adequately Alleged that Defendants Were Directly Informed of Any Material Reserve Deficiency.**

Plaintiffs contend that the Officer Defendants were directly informed that Converium was "massively under-reserved" and that the Complaint includes particularized allegations establishing "'in your face facts,' that cry out, 'how could [defendants] not have known that the financial statements were false.'" (Pls.' Opp'n Mem. at 63). Notwithstanding Plaintiffs' rhetoric, the Complaint, when considered in context with the documents that are integral to it, does not plead with particularity that any of the Officer Defendants were informed that Converium was under-reserved.

i. Loss Reserve Studies

Plaintiffs contend that "[e]ach quarter during the Class Period, Defendant Smith presented to Defendants Lohmann and Kauer the Loss Reserve Study prepared by Converium's North American Actuaries, which consistently identified a significant reserve deficiency." (Pls.' Opp'n Mem. at 62). But as set forth in our Opening Memorandum, these allegations are hopelessly vague and non-specific. (Defs.' Mem. at 46-47) The Complaint provides no indication as to the amount of the reserve deficiency, who prepared the studies, when they were

completed, what reserving figures were reflected in the studies, or any other particularized facts from which a strong inference of scienter might be drawn. Plaintiffs' Opposition makes no effort to address these deficiencies; it simply repeats the conclusory and insufficient allegations of the Complaint.

ii. The Tillinghast Report

In an attempt to show that the Officer Defendants were informed of a reserve deficiency prior to the completion of the IPO, Plaintiffs rely exclusively on their allegation that in April 2001 Tillinghast reported to the Officer Defendants that CRNA was under reserved by $350 million. As set forth in Defendants' Opening Memorandum and above, after completing its reserving work, Tillinghast confirmed that the Company's reserves plus the first-half of 2001 reserve strengthening corresponded to Tillinghast's best estimate. (Defs.' Mem. at 25.) In an effort to sidestep the conclusions reached by Tillinghast after it completed its work, Plaintiffs contend that Tillinghast was "duped." As set forth above, this contention is not alleged in the Complaint and is not supported by any particularized facts; it provides no basis on which to discredit Tillinghast's conclusion that the Company's reserves corresponded with its best estimate or on which to infer scienter.

iii. Post-IPO and 2002 Reserve Development

Plaintiffs next argue that the Officer Defendants were informed that following the IPO in 2001 and during 2002 the Company experienced adverse loss development and that its reserves throughout this period were inadequate. (Pls.' Opp'n Mem. at 62-67.) These allegations, too, lack particularity and are insufficient to raise a strong inference of scienter.

As to the supposed adverse loss development at Converium's North American operations in the 20 days after the IPO, the Complaint vaguely alleges that the Company experienced "up to" $80 million of loss development. (Compl. ¶ 43.) The Complaint nowhere actually alleges the amount of the adverse development, a fact that defendants pointed out in the Opening Memorandum and to which Plaintiffs do not respond. (Defs.' Mem. at 50.) Similarly, the Complaint merely alleges that the Company experienced "up to" $50 million in each quarter of 2002 (without alleging the amount). Nor does the Complaint allege how this adverse loss development was determined, by whom and when it was reported to Lohmann and Kauer. (Compl. ¶ 103; Defs.' Mem. at 50.) And beyond the vagueness of these allegations, in building their argument that the Officer Defendants were supposedly aware of and did nothing about adverse loss development that occurred in 2001 and 2002, Plaintiffs ignore the fact, acknowledged in the Complaint (Compl. ¶ 105), that the Company strengthened reserves substantially in 2002, a move which caused Converium's stock to tumble dramatically and one that is hardly consistent with an effort to hide bad news.

Plaintiffs further contend that the Officer Defendants' knowledge of a reserve deficiency at year-end 2002 is demonstrated by an e-mail sent by Jean-Claude Jacob, Converium's global reserving actuary, in which he purportedly concluded that Converium North America was under reserved by approximately $300 million. (Pls.' Opp'n Mem. at 63.) But the text of this e-mail, which is quoted in the Complaint, makes clear that the estimate referred to was preliminary: "Net Loss reserves as at 4Q02 were US $268M below Group Corporate Actuarial (GCA) preliminary estimate." (Compl. ¶ 107.) Notably, Plaintiffs do not allege any facts showing that CRNA's reserves were materially below GCA's final estimates or that

Converium's consolidated reserves were deficient. Indeed, Deloitte concluded that Converium had no reserve deficiency, but rather a surplus. (Defs.' Mem. at 48.)

Although Deloitte concluded that Converium was more than adequately reserved at year-end 2002, Plaintiffs claim, relying upon Deloitte's initial work in 2003, that the Officer Defendants knew that a reserve deficiency of $437 million existed at Converium North America as of year-end 2002. (Compl. ¶ 114; Pls.' Opp'n Mem. at 63.) But Deloitte's initial findings do not show scienter -- even assuming they had been reviewed by the Officer Defendants, something that is not alleged -- inasmuch as Deloitte performed additional work and later concluded that the deficiency at CRNA was far less than it originally determined and that Converium's overall reserves reflected a surplus. (Defs.' Mem. at 48.) Plaintiffs do not even claim that the conclusions in Deloitte's final report were erroneous. To the contrary, the Complaint explicitly alleges that the Deloitte study "was intended to provide an objective and independent assessment of Converium's reserves" (Compl. ¶108), that to ensure this the Company's senior management, including Lohmann and Kauer, provided the Company's raw data on claims (Compl. ¶ 109), and that the Deloitte review was a "very diligent and accurate review of all the reserves" (Compl. ¶ 110).

iv. The Alleged Adverse Loss Development in 2003

Plaintiffs further claim that internal Converium documents show that the North American reserve deficiency increased by $339.9 million during the first half of 2003 and that Deloitte's conclusions corroborated the extent of that loss development. (Compl. ¶¶ 120-121; Pls.' Opp'n Mem. at 68.) Aside from parroting the Complaint's allegations, Plaintiffs do not respond to Defendants' arguments demonstrating that these allegations fail to meet the pleading requirements of the PSLRA. (Defs.' Mem. at 51-52.) As set forth in more detail there, and not

addressed by Plaintiffs in their Opposition, the fact that the purported source of this information is unidentified "internal Converium documents," with no details such as the author or date, is insufficient. Further, in making these allegations, Plaintiffs use the terms "adverse loss development," "additional loss development," and "total loss development" interchangeably, without defining the terms, thus making it impossible to discern the meaning of these accusations.

Plaintiffs also contend that the Company was under-reserved by $300 million as of the third quarter 2003 as supposedly evidenced by an October 26, 2003 email from Jean-Claude Jacob to the Individual Defendants. (Compl. ¶ 132; Pls.' Opp'n Mem. at 63.) Plaintiffs' description of the email is misleading. First, the email concerns only Converium North America's reserves, not the consolidated reserves of the Company. Yet, as the Complaint itself alleges, by the time this email was sent, the Company was not reporting on a geographical segment basis, a decision which, as set forth below, was disclosed and was fully consistent with applicable accounting requirements. Plaintiffs have not alleged that at the time of this email the Company's consolidated reserves were deficient. Further, even as to Converium North America, the email merely states that its reserves were lower than a *preliminary* estimate. (Compl. ¶ 133 (emphasis added).)

v. Actions Purportedly Taken in 2003 to Hide the Alleged Reserve Deficiency

Plaintiffs contend that in the second half of 2003, Converium novated North America's worst contracts to Europe while secretly increasing North American reserves by $100 million and concealed this by ceasing to report financial results by geographic region. (Compl. ¶¶ 128-139.)

Given the Company's change in reporting structure, disclosure of geographical segment information, such as the novation of reinsurance treaties to European entities and the alleged strengthening of reserves at CRNA in 2003 was not required. Significantly, Plaintiffs have not alleged or contended in their Opposition that the novations or the alleged reserve strengthening at CRNA affected Converium's overall reserves, balance sheet or income statement in any way. The fact is, moreover, that Plaintiffs' contention that these matters were kept secret is demonstrably false. The Company's October 3, 2003 press release specifically disclosed to investors the change in reporting structure (Defs.' Mem. at 52), a change that was fully consistent with the requirements of SFAS 131 (Defs.' Mem. at 53).[10] And the Examination Report issued by the Connecticut Department of Insurance in 2003 clearly disclosed CRNA's plan to increase reserves. (Bodkin Aff., Ex. 17 at 26.) Plaintiffs' Opposition does not dispute any of this.

vi. 2004 Developments

While Plaintiffs allege that Defendants Lohmann and Kauer instructed actuaries to hide reserve deficiencies in 2004, the Complaint itself alleges that this was not done, a fact

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10 Plaintiffs do not dispute that the novations were both reported to and approved by the insurance regulators in the State of Connecticut. The novations were specifically disclosed in the report of the Connecticut Examiner and CRNA's 2003 Annual Statement, documents that were publicly available, and in the Company's 2003 Form 20-F. In their Opposition, Plaintiffs argue that the Court may not consider the documents filed with Connecticut concerning the novations. This argument is not correct, as set forth more fully in Converium's Opposition to Plaintiffs' Motion to Strike. Additionally, Plaintiffs attempt to draw some support from the fact that analysts allegedly did not comment on the novations. That does not change the fact that the Examiner's Report and CRNA's Annual Statement were publicly available. Moreover, the fact that analysts who followed Converium did not comment on them is hardly surprising. As set forth in Converium's Opening Memorandum and uncontested by Plaintiffs, the novations did not impact the Company's overall reserves, income, or balance sheet in any way. (Defs.' Mem. at 53.) Finally, Plaintiffs contend that the Examiner's Report omits what they claim is important "context," namely that Converium's "worst" contracts were novated. But the Report clearly notes that "In the aggregate, the novated treaties are expected to result in CRNA transferring to Converium AG a greater amount of total outstanding loss reserves than the amount of net premium and interest it transfers to Converium AG." (Bodkin Aff., Ex. 17 at 7.)

that Plaintiffs' Opposition continues to make clear. (Compl. ¶ 203; Pls.' Opp'n Mem. at 13, 63.) As set forth above, scienter must be tied to misleading statements, which these are not.

b. The Officer Defendants Did Not Have Knowledge Of Facts That Directly Contradicted Their Public Statements

Plaintiffs assert that "Defendants are deemed to have notice of [facts alleged by Plaintiffs] when they make contradictory statements." (Pls.' Opp'n Mem. at 67). This argument does not advance Plaintiffs' Exchange Act claims in the slightest. As the cases cited by Plaintiffs indicate, establishing scienter on this basis still requires that Plaintiffs allege "[D]efendants' *knowledge of facts or access to contradictory information* . . . ." In re NTL, Inc. Sec. Litig., 347 F. Supp. 2d 15, 28 (S.D.N.Y. 2004) (emphasis added); In re Atlas Air Worldwide Holdings, Inc. Sec. Litig., 324 F. Supp. 2d 474, 489 (S.D.N.Y. 2004) ("[I]f a plaintiff can plead that a defendant made false or misleading statements when contradictory facts of critical importance to the company either *were apparent*, *or should have been apparent*, [an inference of scienter is established.]") (emphasis added). Accordingly, the rule upon which Plaintiffs rely is merely a restatement of the standard for conscious misbehavior or recklessness. Indeed, the court in In re NTL, Inc., in the sentence *immediately following* the one quoted by Plaintiffs, said "[i]t is well established, however, that where plaintiffs contend defendants had access to contrary facts, *they must specifically identify the reports or statements containing this information.*" 347 F. Supp. 2d at 28 (emphasis added) (internal quotations omitted).

Plaintiffs have not alleged a factual basis for inferring scienter on the basis of these cases. As established in Defendants' Opening Memorandum at 23-31 and in section I.A.2 above, Plaintiffs have not adequately alleged that the statements made by the Officer Defendants were contrary to facts about the Company's reserves. Therefore, even if the Officer Defendants

are deemed to have knowledge of facts concerning reserves, those facts would not raise any inference of scienter.

c. Plaintiffs' Argument That the Officer Defendants Are Deemed to have Knowledge Of Facts Concerning Converium's Loss Reserves Does Not Advance Their Deficient Scienter Allegations.

Plaintiffs argue that, because establishment and monitoring of reserves are a "core operation of a reinsurance company," the Officer Defendants are deemed to have knowledge of facts concerning the Company's loss reserves. (Pls.' Opp'n Mem. at 69.) While this contention is contrary to the well-settled principle that scienter cannot be inferred from a defendants' position within the company, see, e.g., In re Sotheby's Holdings, Inc., 00 Civ. 1041, 2000 WL 1234601, at *7 (S.D.N.Y. Aug. 31, 2000) (collecting cases), it does not, in any event, advance Plaintiffs' scienter claim because no facts are alleged demonstrating that the Company's reserves as reported in its SEC filings were materially under-stated.

d. The Officer Defendants' Alleged Role In Managing Reserves Does Not Support an Inference of Scienter.

Plaintiffs further contend that the Officer Defendants' alleged role in managing reserves raises an inference of scienter. (Pls.' Opp'n Mem. at 70.) This argument, too, fails. In the first place, Plaintiffs' allegations as to the Officer Defendants' role with respect to reserves lack particularity. Their allegations that "[Reserve decisions were] handled out of Switzerland," and that the Company "didn't book anything without [the Officer Defendants'] ok" (id.; Compl. ¶¶ 98, 99) are plainly insufficient.

Plaintiffs attempt to buttress this argument by reference to the Officer Defendants' purported control of the novations, change in segment reporting structure and

"secret reserve increases," that Plaintiffs contend were designed to hide a reserve deficiency at CRNA. (Pls.' Opp'n Mem. at 70-72.) But, as set forth in Defendants' Opening Memorandum at 52-54, and above at 25-26, Plaintiffs have not alleged any facts from which it could be inferred that these actions were improper.

e. The "Sheer Size" of the Alleged Reserve Deficiency Does Not Demonstrate Scienter.

Plaintiffs also contend that the "sheer size of the reserve deficiency" supports their scienter allegations. But once again, Plaintiffs hinge this conclusion on the flawed premise that they have adequately alleged that the reserves were understated. As set forth in Defendants' Opening Memorandum at 49-52, and above at I.A.2, there was no such deficiency, and in fact Deloitte concluded that the Company had a reserve *surplus* at the end of 2002.[11]

f. The Existence of Alleged GAAP Violations Does Not Support an Inference of Scienter.

Plaintiffs acknowledge that allegations of GAAP violations are not enough to raise a strong inference of scienter. (Pls.' Opp'n Mem. at 74.) In this Circuit, "[a]llegations of a violation of GAAP provisions . . . without corresponding fraudulent intent, are not sufficient to state a securities fraud claim." Chill v. General Elec. Co., 101 F.3d 263, 270 (2d Cir. 1996).

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[11] Plaintiffs cite In re Global Crossing, Ltd. Sec. Litig., 322 F. Supp. 2d 319, 347 (S.D.N.Y. 2004), Burstyn v. Worldwide Xceed Group, Inc., 01 Civ. 1125, 2002 WL 31191741 (S.D.N.Y. Sept. 30 2002), and Rothman v. Gregor, 220 F.3d 81, 92 (2d Cir. 2000) in support of their argument that the magnitude of the reserve deficiency creates an inference of scienter. Those cases are not on point. The court in Global Crossing relied on the breadth of alleged fraudulent activities, which touched virtually every aspect of the company, rather than the actual size of the accounting fraud. 322 F. Supp. 2d at 346-347. Burstyn addressed a situation where the defendant company, among other things, went from making an allowance of 6.3% of its receivables in one quarter to 45% in the next. 2002 WL 31191741, at *2. In Rothman, the defendant was alleged to have written off "*over 84 percent* of the total royalty advances it had capitalized . . . ." 220 F.3d at 92 (emphasis in original). Here, in contrast, the alleged reserve deficiencies were far smaller in relation to the Company's total reserves. For example, the alleged deficiency of $225 million at the time of the IPO amounted to only 4% of the Company's reserves at that time. Even the $420 million reserve strengthening which the Company took in July 2004 amounted to just 5.8% of the Company's reserves.

Thus, in addition to violations of GAAP, Plaintiffs must allege fraudulent intent sufficient to meet the PSLRA's strict pleading requirements. As shown in Converium's Opening Memorandum at 43-54, and at pages 18-29 above, Plaintiffs have failed to allege such fraudulent intent.

Additionally, Plaintiffs' argument fails because they have not adequately alleged GAAP violations. These purported violations all turn on the fact that ZRNA and CRNA's reserves were knowingly understated throughout the class period. As set forth above, Plaintiffs' allegations in this regard are insufficient. Further, to establish a GAAP violation, Plaintiffs would have to show that Converium's consolidated reserves were insufficient. They have not alleged any such thing, however.

III. THE COMPLAINT FAILS TO ALLEGE A CONTROLLING PERSON CLAIM AGAINST THE OFFICER DEFENDANTS AND DEFENDANTS COLOMBO, MEHL, FÖRTERER, SCHNYDER, HENDRIX AND PARKER.

As set forth in Defendants' Opening Memorandum and sections I.A., B. and C. and II.A above, Plaintiffs have failed to plead a violation of the Securities Act or the Exchange Act. (Defs.' Mem. at 20-38, 41-53.) In the absence of such a violation, the control person claims must fail. (See Defs.' Mem. at 38-39, 54-55.) Plaintiffs also fail to allege culpable participation. Their allegations regarding the actions of the Officer Defendants with respect to reserves are conclusory and insufficient, and they have not alleged that the other Director Defendants played any role in setting reserves.[12] (Defs.' Mem. at 39-41.)

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[12] Plaintiffs incorrectly assert that we have conceded that their Section 15 claims must only satisfy Rule 8. (Pls.' Opp'n Mem. at 20.) Defendants' Opening Memorandum demonstrated that Plaintiffs' underlying Section 11 and Section 12(a)(2) claims, as well as their allegations of culpable participation under Section 15, must be pleaded with particularity, because these claims sound in fraud. (Defs.' Mem. at 22, 39.)

Plaintiffs argue that they need not allege culpable participation. (Pls.' Opp'n Mem. at 80.) But many courts, including this one, have held to the contrary. See In re Alstom SA Sec. Litig., 406 F. Supp. 2d 433, 490 (S.D.N.Y. 2005) (holding plaintiffs must plead culpable participation under Section 20(a)); Shanahan v. Vallat, 03 Civ. 3496, 2004 WL 2937805, at *5 (S.D.N.Y. Dec. 19, 2004) (same); In re Bayer AG Sec. Litig.,. 03 Civ. 1546, 2004 WL 2190357, at *16 (S.D.N.Y. Sept. 30, 2004) (same); Burstyn v. Worldwide Xceed Group, Inc., 01 Civ. 1125, 2002 WL 31191741, at *7 (S.D.N.Y. Sept. 30, 2002) (same); In re Livent, Inc. Noteholders Sec. Litig., 151 F. Supp. 2d 371, 416, 441 (S.D.N.Y. 2001) (holding that the weight of authority "balances toward holding that the plaintiff bears the burden of pleading culpability as part of a *prima facie* case under [Section] 20(a)" and that the same requirements apply to claims brought under Section 15); Demaria v. Andersen, 153 F. Supp. 2d 300, 314 (S.D.N.Y. 2001) (holding a plaintiff must plead culpable participation under Section 15); In re Am. Bank Note Holographic, Inc. Sec. Litig., 93 F. Supp. 2d 424, 441,448 (S.D.N.Y. 2000) (holding that plaintiff must plead culpable participation and applying same test to Section 15 and Section 20(a) claims); Ellison v. Am. Image Motor Co., 36 F. Supp. 2d 628, 637-38 (S.D.N.Y. 1999) (same); Mishkin v. Ageloff, 97 Civ. 2690, 1998 WL 651065, at *24 (S.D.N.Y. Sept. 23, 1998) (holding plaintiffs must plead culpable participation under Section 20(a)).

Further, the Second Circuit has expressly held that "[i]n order to establish a *prima facie* case of [controlling person liability], a plaintiff must show . . . 'that the controlling person was in some meaningful sense a culpable participant' in the primary violation." Boguslavsky v. Kaplan, 159 F.3d 715, 720 (2d Cir. 1998), (quoting SEC v. First Jersey Sec., Inc., 101 F.3d 1450, 1472 (2d Cir. 1996)). Plaintiffs contend that Boguslavsky cannot be read to require that culpable participation be alleged because Boguslavsky was a summary judgment decision. (Pls. Opp'n

Mem. at 81.) This is not correct. In Boguslavsky, the Second Circuit reiterated the requirements of a prima facie case of controlling person liability. The Second Circuit and the district courts have both recognized the import of these statements in concluding that plaintiffs must plead culpable participation. See Suez Equity Investors, L.P. v. Toronto-Dominion Bank, 250 F.3d 87, 101 (2d Cir. 2001) (citing First Jersey, 101 F.3d at 1472) ("Controlling-person liability is a form of secondary liability, under which a plaintiff may allege a primary § 10(b) violation by a person controlled by the defendant and culpable participation by the defendant in the perpetration of the fraud."); In re Livent, Inc. Noteholders Sec. Litig., 151 F. Supp. 2d at 416 (stating that "as Judge Preska expressed in Mishkin, this Court cannot ignore the import of First Jersey, especially in light of the Second Circuit's subsequent affirmations of the same standard").

For the same reason, Plaintiffs cannot avoid dismissal by claiming that control person liability is a fact intensive inquiry and "cannot be resolved at the motion to dismiss stage." (Pls.' Opp'n Mem. at 79 (internal quotations omitted).) To create an issue of fact, Plaintiffs must at least allege culpable participation with particularity -- something they have not done. While Plaintiffs contend that they need not allege culpable participation, as discussed above, this Court, as well as many other courts in this district, have held to the contrary. Accordingly, Plaintiffs' Section 15 and Section 20(a) claims must be dismissed.

IV. THE COURT LACKS PERSONAL JURISDICTION OVER CLARKE, COLOMBO, MEHL, FÖRTERER AND SCHNYDER.

As set forth in Converium's Opening Memorandum, plaintiffs bear the burden of showing that the court has jurisdiction over the defendant on a Fed. R. Civ. P. 12(b)(2) motion to dismiss for lack of personal jurisdiction. (Defs.' Mem. at 56.) While plaintiffs may defeat such a motion based on legally sufficient allegations of jurisdiction (see id. (citing In re Magnetic

Audiotape Antitrust Litig., 334 F.3d 204, 207 (2d Cir. 2003))), Plaintiffs here have failed to meet their burden with respect to defendants Clarke, Colombo, Mehl, Förterer and Schnyder (the "Foreign Defendants").

Plaintiffs do not dispute that a court may exercise personal jurisdiction over a non-resident defendant only if the defendant has minimum contacts with the United States. (Defs.' Mem. at 56-57.) Plaintiffs contend, however, that the Foreign Defendants' roles on Converium's Board of Directors and Board committees and the fact that they signed the Offering Documents reflect sufficient minimum contacts to allow this Court to assert personal jurisdiction over them. (Pls.' Opp'n Mem. at 90-91.) They are not correct.

With respect to the Foreign Defendants' supposed roles on Converium's Board and on Board committees, the Complaint does not in fact allege how those activities concerned the Company's reserves or involved any contacts – minimum or otherwise – with the United States. Service on the Board of a foreign corporation, without more, is insufficient to subject an individual foreign director to the personal jurisdiction of a United States court. See In re DaimlerChrysler AG Sec. Litig., 247 F. Supp. 2d 579, 587 (D. Del. 2003). These assertions in Plaintiffs' Opposition concerning board and committee activities are entirely conclusory and do not provide a basis for this Court to exercise jurisdiction.

As for Plaintiffs' contention that signing the Registration Statement should itself be enough to establish personal jurisdiction, that theory improperly conflates the basis for potential liability with the nexus necessary to find minimum contacts. While Congress may determine that certain acts may subject a person to legal consequences, whether that conduct alone subjects a foreign defendant to the jurisdiction of a United States court raises a different set

of questions. Cf. City of Monroe Employees Ret. Sys. V. Bridgestone Corp., 399 F.3d 651, 667 (6th Cir. 2005) (quotations omitted) (concluding that the "broad understanding of control person liability adopted by the securities laws cannot on its own support person jurisdiction" because it would "impermissibly conflate statutory liability with the Constitution's command that the exercise of personal jurisdiction must be fundamentally fair"). As we showed in Defendants' Opening Memorandum, there is no Supreme Court or Second Circuit case upholding the assertion of personal jurisdiction over a foreign defendant simply because she signed a registration statement. (Defs.' Mem. at 59.) The few lower court decisions Plaintiffs cite for the proposition that merely approving or signing documents filed with the SEC meet the minimum contacts test[13] provide no compelling justification for their holdings. And none of those cases supports the exercise of personal jurisdiction over a defendant like Clarke who only consented to his name being mentioned in the Prospectus as a person who would join the Converium Board following the IPO.

Plaintiffs concede, moreover, that even if the requisite minimum contacts are present, in order for this Court to properly exercise jurisdiction over the Foreign Defendants, it is necessary to find that it is reasonable for this Court to do so. (Pls.' Opp'n Mem. at 87.) In assessing this issue, as Plaintiffs note, courts employ a five factor test: (1) the burden on the defendant; (2) the interests of the forum State; (3) the plaintiffs' interest in obtaining relief; (4) the most efficient interstate resolution of the controversy; and (5) "the shared interest of the several States in furthering fundamental substantive social policies." Asahi Metal Indus. Co. v.

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13 Derensis v. Coopers & Lybrand Chartered Accountants, 930 F. Supp. 1003 (D.N.J. 1996); Itoba Ltd. v. LEP Group PLC, 930 F. Supp. 36 (D. Conn. 1996); Landry v. Price Waterhouse Chartered Accountants, 715 F. Supp. 98 (S.D.N.Y. 1989).

Superior Ct., 480 U.S. 102, 113 (1987). A review of these factors demonstrates that it would be unreasonable to exercise jurisdiction under the circumstances presented here.

In the first place, there can be little question that it will impose a substantial burden on each of the Foreign Defendants to force them to litigate here, thousands of miles from where they live and work. Plaintiffs do not dispute this. Secondly, while Plaintiffs claim that the United States has an interest in enforcing its securities laws against defendants "who were active and willful participants in the international fraud" (Pls.' Opp'n Mem. at 92), the fact is that Plaintiffs have not alleged that the Foreign Defendants engaged in any willful conduct or actively participated in any fraud. Indeed, they have not accused them of fraud at all. Moreover, the United States does not have a paramount interest in adjudicating this case. Most of the alleged conduct about which Plaintiffs complain took place in Switzerland (Compl. ¶¶ 98-100), not here, and many of the putative class members are not United States nationals or residents (Compl. ¶¶ 37-38, 45).

Third, while Plaintiffs and the putative class members may have an interest in obtaining relief if a wrong was committed, Plaintiffs have not shown that this cannot be obtained elsewhere.[14] Fourth, Plaintiffs have not shown that the litigation here on behalf of foreign nationals is the most efficient or effective resolution of the controversy. Indeed, as this Court has recognized, any judgment rendered here might very well not have preclusive affect abroad. See

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[14] Additionally, the interest of the United States in providing a forum and the Plaintiffs' interest in obtaining relief should not be considered significant factors. Even if the Foreign Defendants were dismissed, Converium would remain as a defendant. See City of Monroe Employees Ret. Sys., 399 F.3d at 666 (upholding trial court finding that exercise of jurisdiction over the CEO of a foreign corporation would be unreasonable as the burden on the foreign defendant would outweigh the countervailing interests of the U.S. and the plaintiffs because any potential violation of the securities law would not go unpunished and plaintiffs recovery, if any, would not be affected because the corporate entities remained as defendants).

Ansari v. New York Univ., 179 F.R.D. 112, 116-17 (S.D.N.Y. 1998); CL-Alexanders Laing & Cruickshank v. Goldfeld, 127 F.R.D. 454, 459 (S.D.N.Y. 1989). Finally, Plaintiffs have not shown or even contended that the shared policies of the several states in furthering fundamental social policies would be served by an assertion of jurisdiction over the Foreign Defendants.

Accordingly, the Foreign Defendants urge that the Complaint does not establish a prima facie showing of personal jurisdiction over them. [15]

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[15] The laws of Switzerland, and possibly other foreign jurisdictions, do not recognize the jurisdiction of this Court over the Company, the Foreign Defendants and defendants Lohmann and Kauer. As a result, the Company, the Foreign Defendants and defendants Lohmann and Kauer will under those laws have a right to object to the enforcement of a judgment rendered by this Court in their country of domicile or residence and possibly other jurisdictions outside the United States. The Prospectus identifies this risk. (Bodkin Aff., Ex. 2 Prospectus, at 199.) The Company, the Foreign Defendants and defendants Lohmann and Kauer do not waive, and hereby preserve, all rights to contest the enforceability of any such judgment.

CONCLUSION

For the foregoing reasons, Defendants Converium Holding AG, Dirk Lohmann, Martin Kauer, Richard Smith, Terry G. Clarke, Peter C. Colombo, Georg F. Mehl, Jürgen Förterer, Anton K. Schnyder, Derrell J. Hendrix and George G.C. Parker request that this Court grant their Motion to Dismiss the Consolidated Amended Class Action Complaint with prejudice and grant such other and further relief as this Court deems just and proper.

Dated: March 31, 2006
New York, New York

Respectfully submitted,

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