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

IN RE SCOR HOLDING (SWITZERLAND) AG LITIGATION	)	MASTER FILE 04 Civ. 7897 (DLC)
This Document Relates to: All Cases	)	

LEAD PLAINTIFFS' REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF THEIR MOTION FOR CLASS CERTIFICATION

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INTRODUCTION

Defendants concede that this Action is appropriate for class certification and that Lead Plaintiffs satisfy the typicality and adequacy requirements of Rule 23(a)(3) and (4). The only issues Defendants raise are limited to (1) whether the Court has jurisdiction over the claims of certain foreign investors; (2) whether questions concerning the *res judicata* effect of this Court's orders abroad and the feasibility of providing notice to foreign class members require the exclusion of certain foreign members from the class; and (3) when the Class Period should begin and end. As set forth below, each of these arguments is without merit, and the Court should certify a class that includes all Converium investors for the Class Period of December 11, 2001 through September 2, 2004.

First, with regard to this Court's subject matter jurisdiction over the claims of foreign investors who purchased Converium shares on the SWX Swiss Exchange, the documentary and expert evidence provided by Lead Plaintiffs demonstrates that all Converium investors – regardless of place of residency or where they purchased – can properly be included in the Class because extensive fraudulent conduct occurred in the United States. The crux of Lead Plaintiffs' allegations is that Defendants fraudulently manipulated Converium's North American loss reserves to inflate the Company's financial results. As detailed below, the evidence demonstrates that Converium's most senior officers in the United States and Europe worked hand-in-hand to conceive of and implement the fraud. Indeed, many of the fraudulent reserving decisions were made in the United States – including at an August 2003 meeting of the Converium Board of Directors in Boston at which the fraudulent novation scheme was approved. As detailed below, Converium's actions in the United States "are the very factual predicates of fraud which lie at the heart of plaintiffs' case." *See In re Gaming Lottery Sec. Litig.*, 58 F. Supp.

2d 62, 74 (S.D.N.Y. 1999). As such, this Court has subject matter jurisdiction over the claims of foreign investors who purchased on the SWX.

Second, with regard to the superiority of the class action device, Lead Plaintiffs have demonstrated, through detailed declarations from foreign law experts and other evidence, that the courts of England, Switzerland, Germany, Singapore, Italy and Luxembourg – where the vast majority of foreign class members reside – are highly likely to enforce a judgment entered in this Action. Indeed, this Court, along with others courts in this District, has repeatedly certified securities class actions that include individuals who reside in England and Switzerland and purchased their shares abroad, explicitly recognizing that the English and Swiss courts will likely recognize a U.S. judgment. *See, e.g., Cromer Fin. Ltd. v. Berger*, 205 F.R.D. 113, 134-136 (S.D.N.Y. 2001) (Switzerland and England); *In re Vivendi Universal, S.A. Sec. Litig.*, 242 F.R.D. 76 (S.D.N.Y. 2007) (England). Moreover, Defendants effectively concede that residents of Germany and Singapore should be included in the Class, having provided no evidence to rebut the declarations of Lead Plaintiffs' experts on German and Singaporean law. Lastly, with regard to Italy and Luxembourg, Lead Plaintiffs' experts established the likelihood that U.S. judgments will be recognized in those countries, and Defendants' experts have not rebutted their conclusions.

Defendants' "concerns" about the feasibility of providing notice to foreign investors are also without merit. As the Court is aware, in connection with the $30 million settlement Lead Plaintiffs reached with Zurich Financial Services ("ZFS"), Lead Plaintiffs retained Todd B. Hilsee, a well-recognized expert on providing notice to foreign class members. With Mr. Hilsee's assistance, Lead Plaintiffs developed an extensive Notice Plan – similar to ones that have been approved by Judge Kaplan in *In re Parmalat Securities Litigation* and Judge Holwell

in *Vivendi* – that is specifically designed to provide notice to foreign and domestic class members here. In further support of their motion for class certification, Lead Plaintiffs submit here a declaration from Mr. Hilsee which demonstrates that notice can be provided to foreign class members in this Action in accordance with Rule 23. Tellingly, while Defendants speculate that foreign nominees may not forward the notice to their clients, Defendants have failed to submit any expert declaration, or any evidence at all, to support their assertions. As explained in Mr. Hilsee's declaration, such speculation is baseless, and a class that includes foreign class members is both manageable and superior to any other methods of resolving the claims of thousands of U.S. and foreign investors who were defrauded by Defendants' conduct.

Third, Defendants' arguments that the Class Period should end in November 2002, when the Company disclosed certain reserve increases, or on July 20, 2004, when the Company announced a reserve shortfall of $400 million, should be rejected. It is well-settled that decisions regarding the end date of a Class Period raise questions of fact that should not be resolved at this stage, as the inquiry turns on whether the disclosures completely cured the inflation in the price of the stock. *See, e.g.*, *In re WorldCom, Inc. Sec. Litig.*, 219 F.R.D. 267, 307 (S.D.N.Y. 2003) ("a class period should not be cut off in securities fraud action if questions of fact remain as to whether the disclosures completely cured the market"). Here, it is clear that such fact questions exist. The Company and others made material disclosures regarding Converium's reserves and financial condition after July 20, 2004, which establishes that the truth was not "completely" disclosed at that time (or earlier). Indeed, on August 30, 2004, Converium announced that it would have to increase reserves by as much as an additional $100 million and, in response, the credit rating agencies downgraded the Company on September 2, 2004, leading to the demise of Converium's North American reinsurance business. Both of these disclosures revealed highly

material facts and triggered significant declines in the price of Converium securities, further establishing that the market was not "cured" until September 2, 2004.

Moreover, Defendants' argument that the Class Period must end in November 2002 because that is when the Court determined investors were on "inquiry notice" of their Securities Act claims is without merit. As set forth below, being on inquiry notice simply means that the statute of limitations may begin to run – not that subsequent reliance on Defendants' statements is per se unreasonable, or that a Class Period must end on that date. Indeed, the Court here sustained the Exchange Act claims of persons who purchased Converium securities after November 2002, including claims of aftermarket purchasers that are based on the documents issued in connection with Converium's initial public offering (the "IPO"), thereby explicitly recognizing that investors who bought after the November 2002 disclosures state a claim for fraud. Defendants' argument also ignores the fact that the Court did not hold that investors were on inquiry notice of their Exchange Act claims, and that a finding of inquiry notice for purposes of the Securities Act is not necessarily the same as a finding of inquiry notice for purposes of the Exchange Act. Indeed, courts have explicitly rejected this precise argument, holding that a partial disclosure triggering inquiry notice of claims arising under the Securities Act does not require the class period for Exchange Act claims to end on that same date. *See In re Dynegy Sec. Litig.*, 226 F.R.D. 263, 292 (S.D. Tex. 2005).

Finally, Defendants' argument that the Class Period cannot begin until January 7, 2002 – when the quiet period following the Converium initial public offering ("IPO") ended – should be rejected. Defendants have failed to provide any evidence in response to Lead Plaintiffs' submissions – including the expert declaration of Dr. Scott Hakala – which demonstrate that the market for Converium's shares was efficient on December 11 and immediately thereafter. As

Dr. Hakala concluded, Converium's IPO presented vastly different factual circumstances than the situation presented in *In re Initial Public Offerings Securities Litigation ("In re IPO")*, 471 F.3d 24 (2d Cir. 2006), and there is substantial evidence in this case that the "quiet period" was not observed. Accordingly, the Class Period should begin on December 11, 2001.

For the reasons set forth in Lead Plaintiffs' prior submissions and below, Lead Plaintiffs' motion for class certification should be granted.

ARGUMENT

I. THE COURT HAS SUBJECT MATTER JURISDICTION OVER THE CLAIMS OF ALL CONVERIUM INVESTORS

The preliminary showing necessary to establish the Court's subject matter jurisdiction is not meant to be overly burdensome, "allowing for subject matter jurisdiction so long as 'the federal claim is colorable.'" *Cromer Fin. Ltd. v. Berger*, 137 F.Supp.2d 452, 467 (S.D.N.Y. 2001), *quoting Savoie v. Merchants Bank*, 84 F.3d 52, 57 (2d Cir.1996).

Defendants do not contest that the Court has jurisdiction over the claims of U.S. investors, regardless of where they purchased Converium shares, and of foreign investors who purchased shares in the U.S. Rather, they argue that the Court lacks subject matter jurisdiction over claims of foreign purchasers who purchased Converium's stock on the SWX Swiss Exchange. This argument lacks merit. As demonstrated below, subject matter jurisdiction over the claims of foreign investors who purchased on the SWX Swiss Exchange is warranted because Defendants engaged in extensive fraudulent conduct in the United States.

Under the conduct test, the Court has subject matter jurisdiction if "conduct material to the completion of the fraud occurred in the United States." *Alfadda v. Fenn*, 935 F.2d 475, 478 (2d Cir. 1991). As this Court explained in *Cromer*: "[w]here defendants have undertaken significant steps in the United States in furtherance of a fraudulent scheme, United States courts

have jurisdiction over suits arising from that conduct even if the final transaction occurs outside the United States and involves only foreign investors." 137 F. Supp. 2d at 480.[1] As set forth below, in this case the fraud relates to the manipulation and concealment of a massive loss reserve deficiency at Converium North America by senior management in the United States as well as Switzerland, and much of the fraudulent conduct was conceived and implemented in the United States.

A. The Evidence Corroborates Lead Plaintiffs' Allegations That the Alleged Fraud Related To Converium North America, and That Defendants Engaged in Extensive Fraudulent Conduct in the United States

The Complaint alleges numerous facts which establish that the falsity of Converium's financial statements was attributable entirely to the North American reserve deficiency and resulted from fraudulent conduct that occurred largely in the United States. Specifically, the Complaint alleges that:

- Between 1998 and early 2001, management in both the U.S. and Switzerland – specifically Defendants Smith, Lohmann and Kauer – were aware that the North American loss reserves were deficient and were deteriorating. ¶¶70-73, 77, 78-79.[2]

- The North American loss reserves were closely analyzed through reports prepared for and reviewed by the Chief Reserving Actuary for North America and Defendant Smith. ¶76.

- Tillinghast-Towers Perrin, which is headquartered in Connecticut, identified a reserve deficiency at Converium North America of $350 million as of year-end 2000. ¶¶82-83. However, North American reserving actuaries "pulled a fast one" on Tillinghast to get them to the "right number" so that the Company could

[1] As Judge Marrero explained in *In re Alstom SA Securities Litigation*, "[the] Second Circuit has qualified its conduct doctrine somewhat, having also counseled that in reaching subject matter jurisdiction determinations in these actions, no particular factor is necessarily dispositive, and no one rule is categorically controlling." 406 F. Supp. 2d 346 (S.D.N.Y. 2005), citing *Cornfeld*, 619 F.2d 909, 918 (2d Cir. 1980) ("It should be evident by now that 'the presence or absence of any single factor which was considered significant in other cases dealing with the question of federal jurisdiction in transnational securities cases is not necessarily dispositive in future cases.").

[2] All references to "¶__" refer to paragraphs of the Consolidated Amended Class Action Complaint.

proceed with its IPO, without disclosing the massive North American reserve deficiency. ¶86.

- As of year-end 2002, the Global Reserving Actuary conducted a reserve study specifically to determine "how big the hole in NY was" and ultimately reported to, among others, Brian Kensil (CFO of North America) and Joanne Spalla (then Chief Reserving Actuary in North America) that Converium North America was under-reserved by $293.2 million as of year-end 2002. ¶107.

- Spalla coordinated B&W Deloitte's review of Converium's reserves in 2003. ¶110-112. In the spring of 2003, B&W Deloitte's U.S. office determined that the North American deficiency was $437 million, and Spalla reported those results to Kensil and other North American executives. ¶114.

- The Company novated policies from North America to Zurich to conceal more than $150 million of the reserve deficiency by removing it from the North American books, while secretly strengthening reserves by more than $100 million. ¶¶128-137. The specific purpose of the novation scheme was to remove under-reserved policies from the North American books. *Id.*

- The Company reorganized its operating divisions to mask the performance of North America and the impact of the fraudulent novation scheme, and lied to investors about the purported reason for that "reorganization." ¶¶125-126.

Significantly, evidence obtained through discovery to date corroborates the above allegations and further demonstrates both the centrality of the North American reserve deficiency to the alleged fraud and the extensive involvement of executives of Converium North America in implementing that fraud. Indeed, the evidence demonstrates that senior executives in the United States and Europe knew of the massive reserve deficiency, and yet worked hand in hand to conceal that deficiency from investors so that the Company could report strong financial results.

For example, after the IPO, actuaries in North America determined that Converium North America was under-reserved by $104 million as of the end of the first quarter of 2002, and by $218 million as of the end of the second quarter of 2002. *See* Exhibit 1 to the Declaration of Steven B. Singer (the "Singer Decl."),[3] at CONV P 18104-05. As that actuary noted, he

[3] All references to "Singer Decl. Ex. __ "refer to exhibits to the Singer Declaration.

discussed the facts with both Smith and Kensil in connection with a meeting concerning the Company's 2002 second quarter results, and "[t]he jolt of the 218 vs. the 104 was sobering as I talked them through" the reasons. *Id.* Despite this massive reserve deficiency, the Company "decided to book only $47m of reserve strengthening in North America in Q3", and senior management in the United States was directed to – and did – "adjust the respective numbers in the spreadsheets, [and] the MD&As" (referring to the "Management Discussion and Analysis" section in the Company's SEC filings) to justify that increase. *See* Singer Decl. Ex. 2, at CONV E 1220330-31. Significantly, e-mails circulated among senior management in the United States and Switzerland confirm that the Company booked "only" this $47 million increase not because the Company determined that this was the size of the reserve deficiency, but because Defendants wanted to "show a net [i]ncome of roughly $50m for 3Q02YTD", and "income before taxes that is roughly break even." *Id*.

Documents obtained from Defendants also show that one of the key components of the fraud – the novation of problematic contracts from the United States to Europe to conceal the North American reserve deficiency (¶¶123-133) – was conceived of, approved and executed in the United States. These documents make clear that the purpose of the novation scheme was to transfer the "big losers" and "garbage" in North America to Europe; that the Company decided not to continue to report its financial results by geographic segments but by business units in order to conceal the novations from investors; and that the Company lied to investors about the reasons for this change in October 2003, when Defendants stated that the change was made to "allow us to become even more comparable to our peers and more transparent in our financial reporting." ¶¶187, 188. These documents also show that executives in the United States were

directly involved in developing this scheme, and that the novations were approved and agreed to in Boston. More specifically:

- On July 16, 2003, Kensil and Defendant Smith were discussing the Company's financial results for the second quarter of 2003 with, among others, Defendants Lohmann and Kauer. As e-mails between those officers provide, Converium did not want to record $25 million in "adverse [loss] development" in that quarter and instead wanted to record only $9.7 million, a result that, according to Kauer, "would allow us to show a 'clean' 2Q03 result." Singer Decl. Ex. 3, at CONV E 00968325 – 30. Kauer noted in that e-mail, "The BIG question is, can we reasonably document "only" $9.7 million of adverse developments? Please call!" *Id.*, at 00968326. Later that day, Kensil advised Defendants Kauer, Lohmann and Smith that he had met with the Company's auditors in the United States, and that PwC would not approve recording less than $25 million in adverse loss development, and that such amount was actually at the "bottom of the range" that PwC had calculated. *Id.* at CONV E 00968324. Accordingly, Kensil came up with a plan to support this adjustment: "I think that the only way to possibly get PwC to support an adjustment would be a commitment to effect novations in the near future. Then PwC would have to believe there were adequiate [sic] redundancies in Zurich." *Id.*

- In August 2003, Converium's Board of Directors met in Boston. Singer Decl. Ex. 4, at CONV P-A 76292. At that meeting, B&W Deloitte told the Board that North American reserves were deficient by at least $172 million as of year-end 2002, and that the deficiency was $100 million more than that if calculated using industry data rather than the Company's numbers. *Id.* at 76293-4. Jean-Claude Jacob, the Global Reserving Actuary, then reported that he believed the deficiency in North America as of year-end 2002 was $268 million and that the "reserve situation for North America in his view has deteriorated by some USD 22 million" since the end of the year, creating a "total reserve deficiency of USD 291 million for Converium North America." *Id.* at 76297-98. The Board then discussed the proposed novation scheme and was told by Defendant Lohmann that "The novations would essentially allow to transfer the current North American deficiencies on the relevant contracts to Converium Zurich..." *Id.* at 76298. The Board specifically discussed whether to disclose the novation scheme to investors, and decided not to do so. Instead, the Company decided to implement a "change in segment reporting" specifically to conceal the novation. *Id.* at 76299. The Company also discussed at this meeting "how to package" the proposed novations to investors and decided to lie to the public, informing them that "the proposed change in segment reporting address a legacy issues [sic] which Converium has been inheriting from ZFS and which could not be changed at the time of the IPO in 2001." *Id.* The Board ultimately resolved to approve the

novations at the meeting in Boston, with the understanding that the truth about the North American reserves would not be disclosed to investors. *Id.* at 76300.[4]

- The August 2003 meeting referenced above was one of several meetings of Converium officers and directors convened in the United States to discuss Converium's reserves and financial condition. For example, the Board met in California in March 2002 to discuss the Company's year-end 2001 financial results, as did the Audit Committee. Singer Decl. Ex. 5, at CONV P-A 78222, Singer Decl. Ex. 6 at CONV P-A 78160. The Company's Global Executive Committee also met in California in February 2001 to discuss year-end results in preparation for the March Board meeting. Singer Decl. Ex. 7, at CONV P-A 75217. The Company's loss reserves were addressed at each of these meetings. The Audit Committee also met in New York in October 2002 to discuss the reserve increases announced in October and November 2002 which, as discussed above, were calculated to allow the Company to hit its income target without fully resolving the reserve deficiency identified by actuaries in the U.S. Singer Decl. Ex. 8, at CONV P 165985. Defendants Lohmann and Kauer attended each of these meetings in the U.S.

- One factor driving the Company's need to resolve the North American reserve deficiency was a directive from the Connecticut Department of Insurance that the Company correct that deficiency in order to comply with regulatory requirements. Brian Kensil, in a November 14, 2003 e-mail to, among others, Defendants Lohmann, Kauer and Smith and North American officers, Laurie Desmet, Joanne Spalla and Jean Claude Jacob, wrote "The state of Ct. has instructed us to record $205 million of strengthening. We need to respond to them the week of November 24 and the answer has got to be that we agree and will do so through the novations. Singer Decl. Ex. 9, at CONV E 1034676.[5]

- The same e-mail discussion reflects that Converium North America encountered difficulties in convincing the U.S. auditors at PwC to sign-off on the North American reserves. Joanne Spalla reported that PwC believed the North

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[4] Specifically the minutes of the Board meeting read:

> [Georg F. Mehl, Vice-Chairman of the Board] cautions that Converium should not underestimate the disclosure issue. Any problems arising in this respect may raise even more issues for Converium. [Peter Boller, Chief Actuarial Officer] sees a certain problem in the fact that Converium may be called upon to provide further follow-up information on the basis of the old segmentation, which might defeat the purpose of the novations. [Defendant Kauer] explains that Converium would not entertain such as request once the new segment reporting is implemented.

Id. (emphasis added).

[5] The disclosure to the Connecticut Department of Insurance of the intent to novate policies did not, as Defendants have contended, place investors on notice that the novation scheme (and concomitant reorganization) were being used to conceal a massive reserve deficiency in North America, as that information was never made public. Moreover, the Department of Insurance, for its part, was focused only on assuring that Converium North America maintained the necessary loss reserves to cover its obligations to U.S. insureds—not on the accuracy of the representations made to investors.

American reserve deficiency was as large as $290 million and wrote that "given this large deficiency, PwC would want to make our audit committee aware of the numbers, probably within the next two-three weeks." *Id*. at 1034678. Indeed, Kensil had been working since August to sell PwC on the Company's novation scheme. In an August 17, 2003 e-mail to, among others, Defendants Lohmann, Kauer and Smith, forwarding a "Novation Working Document Draft" Kensil wrote that the "real issue is status with PwC." Singer Decl. Ex. 10, at CONV E 10240.

- Actuaries in Zurich expressed concern over the novation scheme because of the lack of control over "how much garbage NY could novate" given that no one was "protecting Zurich's interests." Singer Decl. Ex. 11, at CONV E 00642076.

These facts are more than sufficient to establish subject matter jurisdiction over the claims of foreign investors who purchased on the SWX Swiss Exchange. *See, e.g., Gaming Lottery*, 58 F. Supp. 2d at 74 (certifying class including Canadian citizens because company's activities within the United States were very factual predicates of the fraud); *In re Nortel Networks Corp. Sec. Litig*., No. 01 Civ. 1855 (RMB), 2003 WL 22077464, at *8 (S.D.N.Y. Sept. 8, 2003) (certifying a class including foreign purchasers where plaintiffs alleged that "[d]efendants were extending vendor financing to numerous U.S. customers that defendants knew to be uncreditworthy, so as to artificially inflate the Company's revenues.").

Nevertheless, in their brief Defendants ignore the allegations referenced above and instead focus exclusively on the allegations that relate to Defendants Lohmann and Kauer, arguing that because these two senior officers were located in Switzerland and ultimately were involved in reviewing and approving the reserves, as a matter of law, the Court lacks subject matter jurisdiction. Defs. Mem. at 16-17. This argument misstates the law and the facts.

As an initial matter, as set forth above (and as Defendants concede), the test for exercising subject matter jurisdiction is not whether the final, ultimate fraudulent act occurred in the United States, but whether "defendants have undertaken significant steps in the United States in furtherance of a fraudulent scheme." *Cromer*, 137 F. Supp. 2d at 480. In other words, even if

the ultimate reserving decisions were made exclusively in Switzerland – which is not the case – there still would be subject matter jurisdiction here because numerous "significant" fraudulent acts occurred in this country.[6]

Moreover, and contrary to Defendants' assertions, the allegations and evidence referenced above establish that the Company's false statements were not engineered entirely in Europe. For example, as discussed above, many of the reserving decisions that are at issue in this litigation were made in the United States, and decisions regarding the Company's financial statements – and what numbers to report – were made by senior officers in the United States as well as Europe. Furthermore, U.S. executives, including Kensil, the North American CFO, were actively involved in the preparation of misleading financial information, including the Company's quarterly results for the third and fourth quarters of 2002 and the second quarter of 2003, and U.S. management was responsible for the novation scheme. Singer Decl. Ex. 12, at CONV E 915482, 915488.

Finally, Defendants improperly attempt to separate elements of their U.S. conduct (such as SEC filings and conference calls with Wall Street analysts) by arguing that, taken alone, such conduct does not give rise to subject matter jurisdiction. Defs. Mem. at 17-18. However, Lead Plaintiffs do not argue that SEC filings or analyst calls – taken alone – give rise to subject matter jurisdiction. Rather, such facts, taken together with the extensive fraudulent U.S. conduct and

[6] In any event, even if the false statements at issue originated abroad or were made by executives in Zurich, that fact alone does not defeat subject matter jurisdiction. *See, e.g., Cromer*, 137 F. Supp. 2d at 480 (subject matter jurisdiction over claims of foreign purchasers where the false financial information was generated in the United States, "then re-transmitted back into this country and abroad"); *Psimenos v. E.F. Hutton & Co.*, 722 F.2d 1041, 1048 (2d Cir. 1983) (courts have subject matter jurisdiction over the claims of foreign investors even when the allegedly actionable statements were made abroad); *Itoba Ltd. v. Lep Group PLC*, 54 F.3d 118, 124 (2d Cir. 1995) ("[T]he situs of preparations for SEC filings should not be determinative of jurisdictional questions. Otherwise, the protection afforded by the Securities Exchange Act could be circumvented simply by preparing SEC filings outside the United States"); *Alfadda* 935 F.2d at 478-79 (U.S. court had subject matter jurisdiction over the claims of foreign nationals who purchased stock abroad where the alleged misrepresentations were made outside of the United States).

other factors identified herein (such as the fact that Converium ADSs traded on the NYSE, Converium's extensive economic activity in the U.S. and the extensive effect of the fraud on U.S. investors) support the Court's exercise of jurisdiction over the entire Class. *See Europe & Overseas Commodity Traders, S.A. v. Banque Paribas London*, 147 F.3d 118, 129 (2d Cir. 1998) ("tipping" factor to be considered together with fraudulent U.S. conduct include transactions on a U.S. exchange, economic activity in the United States, harm to a domestic party, or activity by a U.S. person or entity meriting redress); *In re Vivendi Universal, S.A., Sec. Litig.*, 381 F. Supp. 2d 158, 170 (S.D.N.Y. 2003) ("one can reasonably infer that the alleged fraud on the American exchange was a substantial or significant contributing cause of [foreign investor's] decision[s] to purchase [Vivendi's] stock abroad") (quotes and citations omitted).[7]

II. THE PRESENCE OF FOREIGN CLASS MEMBERS DOES NOT UNDERMINE THE SUPERIORITY OF THE CLASS ACTION DEVICE

Defendants' challenges to the superiority of the class action device are baseless.

A. There is a Strong Likelihood That This Court's Judgment Would Have a Preclusive Effect on Foreign Class Members

Defendants argue that a class action device is not superior here, because, among other things, it is "virtually, if not actually, certain" that this Court's judgment will not be recognized

[7] The cases cited by Defendants wherein courts found subject matter jurisdiction lacking are distinguishable for the lack of U.S. conduct at issue in those cases, and because the financial statements at issue in those cases were engineered entirely abroad. *Froese v. Staff*, No. 02 Civ. 5744, 2003 WL 21523979 (S.D.N.Y. July 7, 2003) involved allegations of channel stuffing by a German company, and the court found there was not substantial U.S. conduct related to the alleged fraud. Similarly, in *In re Bayer AG Sec. Litig.*, 423 F. Supp. 2d 105, 112 (S.D.N.Y. 2005), the plaintiffs failed to identify any "substantial acts in furtherance of the fraud" within the United States, and pointed to just two statements made in the U.S. (one of which the court deemed not actionable). In *In re Rhodia S.A. Sec. Litig.*, No. 1:05 Civ. 5389 (DAB), 2007 WL 2826651, at *9-11 (S.D.N.Y. Sept. 26, 2007), the court found both that the plaintiffs had not alleged sufficient conduct in the United States ("The entire alleged scheme, which involved Rhodia's assumption of liabilities and acquisition of allegedly failing corporations, was engineered by foreign corporations on foreign soil") and that, in any event, the two transactions in the U.S. did not cause the losses of foreign investors because they constituted a *de minimis* element of a much larger scheme executed abroad. These cases are a far cry from this case, where the fraud was engineered in the United States, and related exclusively to the Company's operations in this country.

in the home countries of most of foreign class members, including England, Switzerland, Italy and Luxembourg. Defs. Mem. at 28. Defendants are wrong.

As an initial matter, Lead Plaintiffs note that Defendants' *res judicata* concerns here are purely speculative, highly hypothetical and, ultimately, "much ado about nothing." As this Court and Defendants are aware, the events giving rise to this litigation occurred more than three years ago, and there is no evidence that a single case has been brought against Defendants in any other forum. Moreover, and as further explained below, Defendants' *res judicata* arguments have either been already specifically rejected by this and other courts, or, at most, merely establish that there is a possibility that foreign courts will not recognize a judgment from this Court. As this Court held in *Cromer*, a mere possibility of non-recognition is not sufficient to exclude foreign purchasers from the class. *Cromer Fin. Ltd. v. Berger,* 205 F.R.D. 113, 135 (S.D.N.Y. 2001).

First, the courts in this District, including this Court, have already specifically held that two jurisdictions most pertinent here – England and Switzerland – would likely recognize the enforceability of a U.S. judgment or settlement. *See, e.g., Cromer,* 205 F.R.D. at 134-136 (a class action was superior, because, among other things, it was a mere possibility that a verdict from a U.S. court will have no *res judicata* effect in English and Swiss courts). *See also Vivendi*, 242 F.R.D. 76 (English, Dutch and French courts are likely to give *res judicata* effect to a U.S. judgment or settlement).[8] Nevertheless, Defendants submit declarations from English and Swiss law experts, essentially asking this Court to reconsider its prior ruling and find that a risk of non-

[8] Lead Plaintiffs relied on the decisions reached in *Cromer* and *Vivendi* with respect to *res judicata* in England, and as such, did not submit an expert declaration as to English law with their opening brief. As Defendants have now challenged this point – notwithstanding prior rulings of this Court and others – and specifically challenged the accuracy of the English law expert report submitted in *Vivendi* by Professor Jonathan Harris, Lead Plaintiffs submit herewith a rebuttal Declaration of Professor Harris ("Harris Declaration") (Singer Decl. Ex. 13).

recognition of a U.S. judgment in England and Switzerland is too great to include the foreign purchasers from those jurisdictions as class members here.

Defendants' arguments should be swiftly rejected. As an initial matter, there is nothing in the English and Swiss law declarations submitted by the Defendants that would warrant a conclusion different than that reached by the courts in *Cromer* and *Vivendi*. Indeed, Professor Adrian Briggs – Defendants' English law expert – rehashes the very same jurisdictional arguments relating to the absent class members and cites the same legal authority that the court in *Vivendi* specifically rejected just a few months ago. *See, e.g.*, Briggs Decl. at 18 (Defs. Mem., Ex. 1). Indeed, in the recent case of *Borochoff v. Glaxosmithkline Plc*, No. 07 Civ. 5547 (LLS), 2007 WL 2907812 (S.D.N.Y. Oct. 5, 2007), Judge Stanton appointed an English institution as lead plaintiff with no concerns over foreign recognition of a U.S. judgment in that country. *Id.*

Similarly, Professor Paul Oberhammer – Defendants' Swiss law expert – argues that recognition of a U.S. judgment or settlement would violate fundamental principles of Swiss procedural law because, in essence, plaintiffs would be "forced" to take part in proceedings which they have not commenced. *See, e.g.*, Oberhammer Decl. at 9-13. Daniel Tunik – Lead Plaintiffs' Swiss law expert – expressly refutes this point by reference to existing Swiss legal principles regarding notification,[9] And in fact, this Court has already found the same argument unpersuasive in *Cromer*. *See Cromer*, 205 F.R.D. at 135 (rejecting the arguments raised by "the Ernst & Young expert on Swiss law [who] states that binding class members who are not individually identified and named would be in violation of the 'Swiss ordre public,' because it would in essence bind individuals against their intention"). Defendants also argue that published notice would not be sufficient under Swiss law. Defs. Mem. at 39. Mr. Tunik, Lead Plaintiffs'

[9] See Rebuttal Declaration of Daniel Tunik in Support of Lead Plaintiffs' Motion for Class Certification ("Tunik Rebuttal Decl.") (attached to the Singer Decl., Ex. 14) at ¶¶9-23.

expert, flatly refutes this point and outlines methods by which communications are made to Swiss shareholders in other contexts and deemed adequate, and further describes how the requirements of due service in Switzerland can be satisfied under similar procedures. Tunik Rebuttal Decl. at ¶¶ 14-19. In fact, the notification method described by Mr. Tunik was the very one employed in the recent context of SCOR's offer to buy Converium shares. *Id.* at ¶ 18.

Moreover, Lead Plaintiffs' Swiss and English law declarations clearly establish a strong basis from which to conclude that the Swiss and the English courts will recognize a U.S. judgment.[10] Indeed, Lead Plaintiffs' expert in English law, Professor Jonathan Harris, is the same expert whom courts relied on in *Vivendi* and *In re Royal Ahold N.V. Securities & ERISA Litigation* in certifying a class including English investors. As this Court recognized in *Cromer*, Defendants' experts' legal speculations "at most" establish a mere possibility that a defense verdict will have no *res judicata* effect in England and Switzerland. 205 F.R.D. at 136. Such speculation is not sufficient to exclude the Swiss and the English class members from the class. *Id*.

Second, Defendants have effectively conceded that a U.S. judgment is likely to be recognized in Germany and Singapore. In support of their motion for class certification, Lead Plaintiffs submitted expert declarations from German and Singaporean law experts which establish a strong likelihood that German and Singapore courts would recognize a U.S. judgment. *See* Compendium to Lead Plaintiffs' Mem. In Support of Motion for Class Certification, Ex. 5 (Declaration of Kristian J. Heiser); Ex. 8 (Declaration of Prof. Tan Cheng Han, SC) (Docket No. 158). Significantly, Defendants have not submitted opposing declarations. In view of Lead Plaintiffs' unchallenged affidavits establishing that Germany and

[10] *See generally* Compendium to Lead Plaintiffs' Mem. In Support of Motion for Class Certification, Ex. 10 (Tunik Declaration) (Docket No. 158); Tunik Rebuttal Declaration; Harris Declaration.

Singapore would likely recognize this Court's judgment, there is no basis to exclude those foreign purchasers from the class.[11]

Third, Defendants' arguments that the Italian and Luxembourg courts will not recognize this Court's judgment should also be rejected. Lead Plaintiffs experts in Italian and Luxembourgian law establish that there is a strong likelihood that a U.S. judgment will be recognized by Italian and Luxembourgian courts. Defendants' attempts to discredit Lead Plaintiffs' experts and their conclusions lack merit. As Lead Plaintiffs' Italian expert, Dario Trevisan, amply demonstrates, Defendants' expert inaccurately and incompletely addresses Italian principles of res judicata, the acceptability of the class action mechanism and collective actions in Italy, and how the notification requirement can be squared with the Italian concept of "the right to defence." See Rebuttal Declaration of Dario Trevisan in Support of Lead Plaintiffs' Motion for Class Certification (Singer Decl. Ex. 15).

Defendants' attacks on Lead Plaintiffs' Luxembourgian law expert, Veronique DeMeester, are similarly baseless. Defendants claim that Ms. DeMeester simply "copied" the declaration submitted by Andrea Sabbatini on behalf of the plaintiffs in *In re Parmalat Sec. Litig.*, currently pending before Judge Kaplan. This accusation is baseless. Ms. DeMeester and Mr. Sabbatini are partners and members of the same law firm, as is evident from the face of both declarations. They collaborated on Mr. Sabbatini's declaration in *Parmalat*, and, as Ms. DeMeester explains, the law in Luxembourg has not changed in the eleven months since the last report was filed. There was no reason to materially change the report, the conclusion of which is that Luxembourg would likely recognize a judgment of this Court. In any event, Defendants'

[11] In a footnote, Defendants attack Lead Plaintiffs' German and Singaporean law experts. Defs. Mem. at 33, n.24. In both instances, Defendants' challenges are weak and unsubstantiated, and do not even attempt to refute Lead Plaintiffs' experts' conclusions.

Luxembourgian expert's concerns – such as the procedural rights of class members and the notification of Converium investors in Luxembourg – are addressed in Ms. DeMeester's declaration. *See e.g.*, DeMeester Decl. at 6 (rights of individuals to be called to appear) and ("The rules of notification provide guarantees aiming at the same finality" under Luxembourgian law as under U.S. law).

Ultimately, as Defendants' experts wholly fail to establish that a class action judgment in this Court would not be given *res judicata* effect in the courts of Italy and Luxembourg, their challenges to Plaintiffs' expert report should be rejected. As noted above, such speculation is not sufficient to exclude the foreign purchasers from those two countries from the class. *Cromer*, 205 F.R.D. at 135.

Finally, even if it was a near certainty that a foreign court would not give res judicata effect to a U.S. judgment, that still does not mean that the Class should not be certified. As this Court has explicitly held:

> Even if all the available evidence indicates that foreign plaintiffs who lose in the United States will be able to sue the defendant a second time in their own country, a class action may remain the superior means for litigating the dispute, particularly where the court can take action to increase the benefits for the defendants as well as the plaintiffs.

Id. at 135. For example, in *In re Lloyd's American Trust Fund Litigation*, No. 96 Civ. 1262 (RWS), 1998 WL 50211 (S.D.N.Y. Feb. 6, 1998), Judge Sweet – presented with uncontroverted evidence that foreign plaintiffs would still be able to bring a lawsuit in five other countries – found that the class action device would be superior, reasoning that the foreign courts may look to the results achieved in the United States for guidance and, if the plaintiffs succeeded, a court-fashioned proof of claim mechanism might be able to bind all participants and discourage re-litigation. The same logic should apply here. Thus, even if this Court concludes that some foreign jurisdictions at issue in this case will not recognize a U.S. judgment – which it should not

– the class action, including foreign purchasers from those jurisdictions, is still the superior method of adjudication.

The cases cited by the Defendants do not warrant a different conclusion. Defendants' reliance upon *Kern v. Siemens Corp.*, 393 F.3d 120 (2d Cir. 2004), and *CL-Alexanders Laing & Cruickshank v. Goldfeld*, 127 F.R.D. 454 (S.D.N.Y. 1989) is misplaced. In both cases, the court found that an "opt-in" provision – requiring class members to affirmatively consent to inclusion in the class – offended Rule 23. *See Kern*, 393 F.3d at 128-29; *CL-Alexanders*, 127 F.R.D. at 460. Lead Plaintiffs in the instant action do not and need not craft such an opt-in class in order to make a resolution in this Court more palatable to foreign legal systems, for – as Lead Plaintiffs' foreign declarations demonstrate – the relevant foreign countries have their own mechanisms in place for recognition and/or enforcement of a U.S. judgment. As such, these cases have no bearing here. It also deserves note that in *CL-Alexanders*, Judge Mukasey found a multitude of problems weighing on class certification – including numerosity and plaintiffs' atypical position as underwriter for the private placement – and held that "the combination of these problems, no one of which standing alone would necessarily require denial of class certification, virtually mandates rejection of the class action form here." *CL-Alexanders*, 127 F.R.D. at 460 (emphasis added). Judge Mukasey ruled similarly in *Ansari v. New York University*, 179 F.R.D. 112 (S.D.N.Y. 1998), where, in denying class certification, the court focused on the plaintiff's failure to establish numerosity, and further observed that neither party had submitted any affidavits as to the preclusive effect that would be afforded a U.S. judgment abroad. *Id.* at 116-17. Again, neither concern is implicated here. Finally, *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974 (2d Cir. 1975) is also clearly distinguishable. In *Bersch*, unlike in this case, the Second Circuit was presented with unchallenged expert evidence that foreign

jurisdictions will not recognize a U.S. judgment, and an affidavit stating that several hundred individual claims had been brought against defendants in Switzerland, and as many as ninety of those claims had already been settled.

In sum, Lead Plaintiffs have presented ample evidence that the foreign jurisdictions at issue in this case will likely recognize this Court's judgment and the Court should certify the class including all foreign purchasers.[12]

B. The Proposed Notice Plan is Sufficient to Identify and Reach Foreign Shareholders

Defendants' attempt to undermine Lead Plaintiffs' proposed notice plan misses the mark. It is well established that in light of the capabilities of today's law firms and settlement administrators, the "issue of foreign notice is not sufficiently grave to defeat class certification." *See, e.g., In re Lloyd's American Trust Fund Litig.*, C.A. No. 96-1262 (RWS), 1998 WL 50211, *16 (S.D.N.Y. Feb. 6, 1998). Indeed, courts in this and other jurisdictions routinely certify classes consisting of U.S. and foreign class members. *See, e.g., Vivendi*, 242 F.R.D. 76 (certifying class including English, Dutch and French class members); *Cromer*, 205 F.R.D. 113 (certifying class including Swiss and English class members); *In re Agent Orange Product Liab. Litig.*, 100 F.R.D. 718 (E.D.N.Y. 1983) (certifying class including Australian class members).

Contrary to Defendants' assertions, Lead Plaintiffs' proposed Notice Plan fully complies with the requirements of Rule 23. As set forth in Lead Plaintiffs' opening brief, Lead Plaintiffs have retained Todd B. Hilsee of Hilsoft Notifications, a well known international notice expert. Mr. Hilsee provided global notice plans for, and completed international notice in, numerous

[12] Defendants also assert--without any support--that because a judgment of this Court could not be binding on foreign class members, it is impossible to craft adequate notice to such foreign investors. Defs. Mem. at 40. This contention is expressly contradicted by the declarations and rebuttals of each of Lead Plaintiffs' foreign law experts, all of whom specifically address how proper notification under their respective legal system could be effected once the U.S. judgment is recognized and given appropriate effect.

high profile international cases, including *In re Parmalat Sec. Litig.* 04 MD 1653 (LAK) (S.D.N.Y.); *In re Ahold N.V. Sec. & ERISA Litig.*, Civ. NO. 1:03-MD-1539 (D. Md.) and *In re Holocaust Victim Assets Litig., Nos.*, 96 Civ. 4849 (ERK)(MDG), 99 Civ. 5161 (E.D.N.Y.). Indeed, this Court has already preliminarily approved the retention of Mr. Hilsee in connection with Lead Plaintiffs' settlement with to design a global notice plan, including Switzerland, based on his experience as an international notice expert. *See In re Converium Holding AG Litig.*, 04 Civ. 7897 (DLC) (S.D.N.Y.), Order Preliminarily Certifying Class For Settlement Purposes And Preliminarily Approving Settlement with Zurich Financial Services, 8.a. (S.D.N.Y. September 4, 2007) (Docket No. 146).

As described in more detail below and in the Reply of Todd B. Hilsee to Converium's Memorandum of Law in Opposition to Lead Plaintiffs' Motion for Class Certification (Singer Decl. Ex. 16), Lead Plaintiffs' proposed Notice Plan implements an integrated approach by combining direct mailing, through regular and electronic media, to addressees that can be reasonably ascertained, and publication in newspapers and others publications in those cities and countries where Converium shareholders are predominantly located. This type of integrated approach has been widely accepted by courts. *See Vivendi*, 242 F.R.D. at 107, 108 (affidavit of Hilsee adequately addressed the defendants' manageability concerns with respect to worldwide notice; *In re Holocaust Victim Assets Litig.*, 105 F. Supp. 2d 139, 144 (E.D.N.Y. 2000) (approving integrated worldwide notice program); *Gross v. Barnett Banks, Inc.*, 934 F. Supp. 1340, 1344 (M.D. Fla. 1995) (holding that mailing notice to last known address and publication in local newspapers was sufficient); *Vancouver Women's Health Collective Soc'y v. A.H. Robins Co., Inc.*, 820 F.2d 1359, 1361-63 (4th Cir. 1987) (integrated worldwide notice program involving over 90 countries approved); *Montelongo v. Meese*, 803 F.2d 1341, 1351-52 (5th Cir.

1986) (approving notice involving letters, media campaigns, and personal outreach). *See also In re NASDAQ Market-Makers Antitrust Litig.*, 169 F.R.D. 493, 515 n.19 (S.D.N.Y. 1996) (agreed that notice program may consist of only published notice when appropriate).

Significantly, Defendants fail to offer any evidence – let alone expert evidence – that the Notice Plan proposed by Lead Plaintiffs is insufficient, relying instead on rank speculation. For example, Defendants argue that Notice will not reach many of Converium's unregistered shareholders because they cannot be identified by Converium or SAG SIS Aktienregister AG ("SAG"), and there is no assurance that custodian banks identified in place of unregistered shareholders can or will transmit notice to putative class members. This argument has no legal or factual support whatsoever. On the contrary, as described in more detail in Mr. Hilsee's declaration, in other international securities litigations, including *Parmalat,* custodians from, *inter alia*, France, Germany, Luxembourg, Switzerland, and the England, readily assisted in notifying class members. Hilsee Decl., ¶¶ 7-9.

Defendants also misconstrue the applicable legal standards. For example, Defendants argue that Lead Plaintiffs cannot "prove" that notice will succeed. Defs. Mem. at 37-40. But Lead Plaintiffs merely need to show that notice is "reasonably calculated, under all of the circumstances, to apprise interested parties of the pendency of the settlement proposed and to afford them an opportunity to present their objections." *In re Prudential Ins. Co. of America Sales Practices Litig.*, 962 F. Supp. 450, 527-28 (D.N.J. 1997) (*citing Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)); *Weinberger v. Kendrick*, 698 F.2d 61, 70 (2d Cir. 1982). Actual notice is not required. *Gross*, 934 F. Supp. at 1344 (holding that mailing notice to last known address and publication in local newspapers was sufficient). Moreover, where addresses cannot be reasonably ascertained for direct mailing, publication notice is

adequate to satisfy due process concerns, even where the class contains foreign class members. *Vivendi*, 242 F.R.D. at 107; *see also In re Western Union Money Transfer Litig.*, C.A. No. 01-0335(CPS), 2004 WL 3709932, at *5 (E.D.N.Y. Oct. 19, 2004) (publication notice to putative class numbers, including foreign class members, that could not be reasonably identified is adequate); *In re Austrian and German Bank Holocaust Litig.*, 80 F. Supp. 2d 164, 175 (S.D.N.Y. 2000) (same).

In sum, there is little doubt that the Lead Plaintiffs' proposed Notice Plan will satisfy all requirements of Rule 23.

III. THE CLASS PERIOD SHOULD END ON SEPTEMBER 2, 2004

Defendants also contend that the Class Period should end on November 19, 2002 or, in the alternative, nearly two years later, on July 20, 2004. These arguments are without merit.

First, in securities class actions, a class period only ends when new information completely "cures the market" of the artificial inflation in the price of the subject security. *See, e.g., In re Interpublic Sec. Litig.*, 02 CIV 5627 (DLC), 2003 U.S. Dist. LEXIS 19784, at *13-16 (S.D.N.Y. Nov. 7, 2003) (holding that a "curative press release [that] effected a complete cure of the market" would require the court to "cut off the class period at that date.") (internal citations and quotation marks omitted); *In re AM Int'l, Inc. Sec. Litig.*, 108 F.R.D. 190, 193 (S.D.N.Y. 1985) (same). It is well-settled that the determination of when the market has been completely "cured" raises questions of fact that should not be resolved at this stage of the litigation. "[A] class period should not be cut off if questions of fact remain as to whether the disclosures completely cured the market." *In re WorldCom, Inc. Sec. Litig.*, 219 F.R.D. 267, 307 (S.D.N.Y. 2003), citing *Sirota v. Solitron Devices, Inc.*, 673 F.2d 566, 572 (2d Cir. 1982); *Friedlander v. Barnes*, 104 F.R.D. 417, 421 (S.D.N.Y. 1984); *see also In re AMF Bowling Sec. Litig.*, No. 99 Civ. 3023 (DC), 2002 WL 1033826, at *2 (S.D.N.Y. May 21, 2002) ("[W]hether an investor

knew or should have known of the supposed inaccuracies after one, two, or three quarters of disappointing earnings is a substantial question of fact. Only if a release to the market clearly and unequivocally revealed the inaccuracies of the prospectus might such a narrowing of the class be appropriate."); *Gaming Lottery*, 58 F. Supp. 2d at 62, 77 ("Whether claims falling outside some narrower window within the class period are, in fact, groundless on the merits is a question of fact for the jury that should not be answered when the court decides whether to certify a class").[13]

Here, the evidence establishes that the market was not cured until September 2, 2004. On that day, Converium issued a press release announcing that, as a result of its recently disclosed reserve increases, both S&P and A.M. Best had downgraded the Company's credit ratings. ¶216. That September 2 announcement was immediately precipitated by the Company's announcement on August 30, 2004, that it needed to increase its reserves by as much as an additional $100 million beyond the $400 million increase that had been disclosed on July 20, 2004. ¶215. The August 30 and September 2 announcements caused the price of Converium securities to fall by more than 20%, and ultimately led to the Company's announcement on September 10, 2004 that it would be forced to place its North American business into run-off. ¶¶215-218. In sum, the August 30 and September 2 announcements disclosed material information related to

[13] This is the rule followed in other jurisdictions as well. *See, e.g., In re Scientific-Atlanta, Inc. Sec. Litig.*, No. 01 Civ. 1959, 2007 WL 2683729, at *21-22 (N.D. Ga. 2007) (whether partial disclosure "fully cured" the market was a common question of fact that could not be resolved on motion for class certification). *In re Enron Corp. Sec. Litig.*, No. 01 Civ. 3624, 2006 WL 4381143 (S.D. Tex. 2006) (disputes as to which corrective disclosure marked end of class period "are issues of fact that should be determined at trial"); *In re Dynegy Sec. Litig.*, 226 F.R.D. 263, 292 (S.D. Tex. 2005) ("the precise day on which natural market forces had a reasonable time to digest and reflect the bad news in the market price is, necessarily, a question of fact"); *Bovee v. Coopers & Lybrand*, 216 F.R.D. 596, 614-15 (S.D. Ohio 2003) (substantial question of fact as to when the market was cured because even though a great deal of negative information had come out before class representatives purchased their stock, which had dropped below $1 in price, in the midst of these negative disclosures defendants had filed a Form 10-K with numerous misrepresentations and omissions); *In re Ribozyme Pharmaceuticals, Inc. Sec. Litig.*, 205 F.R.D. 572, 579 (D. Colo. 2001) (when there is a "substantial question of fact as to whether the release had cured the market or was itself misleading... then the broader time period will be certified").

Converium's reserve issues and financial condition, and, as Dr. Hakala determined, each disclosure had a statistically significant impact on the price of the securities. Declaration of Scott P. Hakala, PhD, CFA Regarding Market Efficiency ("Hakala Decl.") (Lead Plntfs' Mem., Ex. 1) ¶5(e).

Notwithstanding these undisputed facts, Defendants argue that the Class Period should end almost two years earlier, or on November 19, 2002, when Converium announced that it had "finalized" a loss reserve analysis commissioned in late October 2002, and would increase its reserves by approximately $70 million as a result. ¶¶165-70. This contention is absurd, given that the Company remained massively under-reserved following this increase, and Defendants continued to issue false statements about the strength of Converium's reserves and financial condition long after November 19, 2002.

Defendants also attempt to find support for this argument in this Court's December 28, 2006 opinion, which held that investors were on inquiry notice of their claims arising under the Securities Act as of November 19, 2002. Defs. Mem. at 21-22, citing *In re Converium Holding AG Sec. Litig.*, No. 04 Civ. 7897, 2006 WL 3804619, at *17 (S.D.N.Y. Dec. 28, 2006). Defendants are wrong. Neither this Court's December 28 opinion or, for that matter, any other case law, supports Defendants' argument.

As an initial matter, the Court's December 28 opinion was limited to Lead Plaintiffs' Securities Act claims, and held only that investors were on notice that Converium's reserves were understated at the time of the IPO. *Id.* The Court did not hold that investors were on inquiry notice of their Exchange Act claims, or that Defendants were engaged in fraudulent conduct, and in fact the Court has specifically sustained the Exchange Act claims of persons who purchased after November 19, 2002. *Id.* at *18. Indeed, the Court subsequently sustained the

Exchange Act claims of aftermarket purchasers based on the false IPO statements. *In re Converium Holding AG Sec. Litig.*, No. 04 Civ. 7897, 2007 WL 1041480 (S.D.N.Y. April, 9, 2007). This is because – as this Court recognized in *Openwave* on October 31, 2007 – a finding of inquiry notice for purposes of the Securities Act is not necessarily the same as a finding of inquiry notice for purposes of the Exchange Act. *In re Openwave Systems Sec. Litig.*, No. 07 Civ. 1309 (DLC), Slip. Op. at 20 (S.D.N.Y. Oct. 31, 2007) ("[B]ecause plaintiff's Securities Act claims are not fraud-related, but rather concern strict liability and negligence for misrepresentations or misstatements by the defendants, the disclosures gave plaintiff more than adequate prompting to inquire into Openwave's alleged wrongdoing."). In light of these facts, for Defendants to argue that the Court must end the Class Period on November 19, 2002, because no investor who purchased after that date could have "reasonably relied" on Defendants' false statements, is meritless.

Indeed, Defendants' argument rests on a fundamental misunderstanding of what inquiry notice means. As this Court has recognized, being on "inquiry notice" simply means there are facts which give rise to a duty to investigate. *In re Converium Holding AG Sec. Litig.*, 2006 WL 3804619, at *16. Being on inquiry notice does not mean that the market has been fully "cured" of inflation as of that date, or that investors cannot have "reasonably relied" on defendants' false statements after that date. Determining that investors are on inquiry notice of a claim simply means that investors had to bring suit within one (or two) years of that date. Obviously, investors who timely brought suit – as the Exchange Act class indisputably did – are entitled to rely on false statements that were made after the inquiry notice date. Ultimately, of course, whether investors "reasonably relied" on any of Defendants' false statements is a question of fact common to all class members, and one that weighs heavily in favor of class certification.

In fact, other courts have rejected the argument that a disclosure triggering inquiry notice for purposes of the Securities Act marks the end of a class period for claims arising under the Exchange Act. For example, in *Dynegy*, the court held that the class period for the Exchange Act claims appropriately ended long after the class was on inquiry notice of their Securities Act claims, stating that "[a]lthough the court is persuaded that May 15, 2002 is the day on which corrective disclosures sufficient to trigger the statute of limitations for the 1933 Act claims … the court is not persuaded that the class period for the 1934 Act claims should end on that date." 226 F.R.D. at 292. As that court recognized, "the precise day on which natural market forces had a reasonable time to digest and reflect the bad news in the market price is, necessarily a question of fact," and plaintiffs had "evidentiary support" for ending the Class Period on a later date. *Id.*, citing *In re Oxford Health Plans Inc. Sec. Litig.*, 191 F.R.D. 369, 378 (S.D.N.Y. 2000). Here, as in *Dynegy*, the Class Period for Exchange Act claims does not end simply because investors were on inquiry notice of claims under the Securities Act.[14]

Implicitly recognizing that their argument that the Class Period must end on November 19, 2002 is frivolous, Defendants argue in the alternative that the Class Period "must" end on July 20, 2004, because Lead Plaintiffs "have conceded that the fraud was revealed that day." Defs. Mem. at 24-27. While the July 20 disclosure was undoubtedly a material partial disclosure

[14] In making this argument, Defendants rely exclusively on *Shah v. Meeker*, 435 F.3d 244 (2d Cir. 2006). Their reliance is misplaced. *Shah* did not concern a motion for class certification, or the length of a class period, and it certainly did not hold that, as a matter of law, a class period must end when a court finds inquiry notice for statute of limitations purposes. In *Shah*, the plaintiffs alleged that all analyst reports issued by Morgan Stanley were false and misleading because they failed to disclose conflicts of interest between the analyst, Mary Meeker, and investment banking clients. *Id.* at 245. However, the articles fully disclosing those conflicts appeared more than two years before the date of suit – the articles "described in great detail how Meeker's divided loyalties in fact affected her analytical reports" – and the Second Circuit held that investors were on inquiry notice of their Exchange Act claims as of the date of those articles. *Id.* at 250-52. Significantly, in *Shah* there was no argument that any part of the alleged fraud had not been revealed by those articles. Instead, plaintiffs argued that, because Morgan Stanley continued to issue analyst reports from Meeker which did not disclose these conflicts, the statute of limitations should not run. It was only in that context that the Second Circuit held it was "unreasonable after May 2001 to rely on the market price of Morgan Stanley stock." *Id.* at 252.

that caused extensive damages to the Class – the Company announced that it would need to increase its reserves by $400 million, and the price of Converium securities fell 50% in response, resulting in a one-day market capitalization loss of nearly $1 billion (¶¶208-10) – it cannot be said to have "completely cured" the market of the inflation in the price of the stock. Indeed, on a conference call that day, Defendant Lohmann sought to reassure investors by falsely telling them that "we do not expect to see further reserve development" and, as set forth above, on August 30, 2004, the Company announced that the reserve increase would be as much as $500 million (ultimately, the Company increases reserves by $562 million). ¶¶209,215, 217. In light of these facts, the Court cannot conclude as a matter of law that the Class Period should end on July 20, 2004.

IV. THE CLASS PERIOD SHOULD BEGIN ON DECEMBER 11, 2001

In arguing that the Class Period should begin on January 7, 2002, Defendants fail to address any of the facts of this case or the extensive evidence submitted by Lead Plaintiffs – including an uncontroverted expert opinion – which establishes that the market for Converium stock was efficient on the day of Converium's IPO and immediately thereafter. The efficiency of that market gives rise to a presumption of reliance that facilitates the certification of a class including all investors who purchased Converium shares or ADSs beginning on December 11, 2001.

Having failed to provide any response to Lead Plaintiffs' evidence concerning market efficiency, Defendants' are left to argue that *In re Initial Public Offerings Securities Litigation* ("*In re IPO*"), 471 F.3d 24 (2d Cir. 2007) and this Court's December 28, 2006 Order preclude certification of a class beginning on December 11, 2001, the date of Converium's IPO.[15] Lead

[15] Defendants' assertion that Lead Plaintiffs are "relitigating" this issue is incorrect. The Court's prior ruling granting in part Defendants' motions to dismiss considered only the allegations of the Complaint under Rule 12.

Plaintiffs respectfully submit that the Second Circuit's holding in that case is critically, if narrowly, distinguishable. Moreover, to the extent that *In re IPO* applies, it addresses only the day of the IPO itself and leaves open the question of how soon, following an initial offering, market efficiency can be demonstrated. Defendants offer no basis for delaying the start of the Class Period until January 7 other than the "quiet period" which, as explained below, was not observed here. *In re IPO* does not hold that market efficiency cannot be demonstrated during that quiet period. Thus, at the latest, the Class Period can begin on December 12, 2001 with all class members afforded the presumption of reliance.

Through Dr. Hakala's expert declaration, Lead Plaintiffs establish that the market for Converium shares and ADSs was efficient on the date of the IPO, and immediately thereafter. As detailed in Dr. Hakala uncontroverted declaration, several key facts made the Converium IPO unique and distinguishable from the offerings at issue in *In re IPO*. For example, Dr. Hakala points to the fact that, as a major component of ZFS – a publicly traded company – that was spun-off through the IPO, Converium was subject to extensive scrutiny by investors and analyst prior to its IPO. Hakala Decl. ¶¶6, 13. Indeed, analysts tracking ZFS' performance closely watched the IPO and repeatedly commented on the value of Converium prior to the IPO. *Id*. Those analysts were able to precisely predict the value of the IPO, thus demonstrating that the market had information about Converium before it was offered to the public and was able to use the information to value the Company's securities. *See* November 21, 2001 HSBC Report;[16] *see*

The Court did not, at that time, have the opportunity to consider the evidence submitted by Lead Plaintiffs, including the expert declaration of Dr. Scott D. Hakala. That Lead Plaintiffs did not move for reconsideration of this Court's December 28, 2006 decision with regard to the claims of IPO purchasers is irrelevant. While Lead Plaintiffs determined not to seek reconsideration of the Court's analysis of the allegations in the Complaint under Rule 12, that decision does not preclude the Court from considering whether the evidence submitted in support of Lead Plaintiffs' motion for class certification establishes market efficiency on the date of Converium's IPO.

[16] A copy of this report was submitted as Exhibit 2 to the Compendium of Exhibits filed in support of the instant motions. Docket No. 158.

also Hakala Decl. ¶17 ("the pricing of Converium shares at the time of the IPO was relatively precise"). Moreover, Dr. Hakala concluded that the lack of movement of the price of those securities demonstrates the efficiency of the market for Converium shares on the date of the IPO and immediately thereafter. Hakala Decl. ¶¶7, 17. These factors distinguish the Converium IPO from those at issue in *In re IPO* because the offerings at issue in that case were for start-up companies that were not subject to market analysis as part of a publicly traded company before they went public – and the price of those securities rose dramatically immediately following the IPO.[17]

As noted above, Defendants fail to provide any evidence that contradicts Dr. Hakala's expert conclusions, opting instead to simply question a few bases of his conclusion. For example, in response to Dr. Hakala's conclusion that the consistency of Converium's stock price provides evidence of market efficiency at the time of the IPO, Defendants cite to SEC regulations concerning underwriter stabilization. Defs. Mem. at 44. Yet they provide absolutely no evidence as to whether the underwriters actually played any role in stabilizing the price of those securities. Defendants similarly fail to disprove Dr. Hakala's statement that there was extensive coverage of Converium, and can only point to the fact that Dr. Hakala's declaration identifies a single example of such coverage during the quiet period. Defs. Mem. at 44. This is not accurate. Dr. Hakala cites to several examples of such coverage prior to and during the quiet period, including analyst coverage of ZFS that specifically discussed Converium and the pending IPO, ratings provided by A.M. Best and Standard & Poor's and coverage of Converium itself following the IPO. Hakala Decl. ¶¶6, 13. In any event, the conjecture and speculation proffered

[17] Contrary to Defendants' assertion that Dr. Hakala failed to distinguish this extensive analyst coverage from the "road shows" conducted for new companies (Defs. Mem at 44), Dr. Hakala concluded that information about the spin-off of Converium from ZFS is distinct from information concerning "road shows" because it reflected independent analysis of an already public company by a range of sophisticated institutions, including analyst firms and rating agencies.

by Defendants in response to Lead Plaintiffs' expert declaration and documentary evidence is insufficient to demonstrate at this stage of the litigation that the class is not entitled to the presumption of reliance for purchases on, or immediately after, the IPO. Moreover, and as discussed further above, the issue of when the class period should begin and end, and whether reliance was reasonable, presents questions of fact reserved for the jury.

Finally, Defendants fail to respond to Lead Plaintiffs' argument that this Court can certify a class beginning on the date of Converium's IPO even if market efficiency cannot be established on that day. Defendants misstated Lead Plaintiffs' position in their brief, suggesting that "Plaintiffs acknowledge, as they must, that in order to meet the 'predominance' requirement of Rule 23(b)(3) they… must take advantage of the fraud-on-the-market presumption of reliance." Defs. Mem. at 40-41. To the contrary, on the basis of this Court's opinions in *WorldCom* and *Cromer*, Lead Plaintiffs' argued that individualized questions of reliance – particularly when limited to investors who purchased during a limited portion of the Class Period – do not defeat predominance. Lead Plntfs. Mem. at 21, citing *WorldCom*, 219 F.R.D. at 292 n.29; Cromer, 205 F.R.D. at 128 n.17. Thus, the Court can certify the Class beginning on December 11, 2001 regardless of whether the market for Converium shares and ADSs was efficient that day.

CONCLUSION

For the reasons set forth herein, Lead Plaintiffs respectfully submit that their motion for class certification and appointment of class counsel should be granted in its entirety.

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Respectfully submitted,

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