UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re CONVERIUM HOLDING AG SECURITIES LITIGATION	:	No. 04 Civ. 7897 (DLC)
This document relates to: ALL ACTIONS	:	

MEMORANDUM OF LAW IN OPPOSITION TO
LEAD PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

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Statutes and Rules

Defendants Scor Holding (Switzerland) AG (f/k/a Converium Holding AG and referred to herein as "Converium" or the "Company"), Dirk Lohmann, Martin Kauer and Richard Smith respectfully submit this Memorandum of Law In Opposition To Lead Plaintiffs' Motion For Class Certification.

PRELIMINARY STATEMENT

Plaintiffs seek certification of a class ("Proposed Class") consisting of all those who purchased Converium shares traded on the SWX Swiss Exchange and American Depositary Shares ("ADSs") during the period from December 11, 2001 through September 2, 2004 ("Proposed Class Period"), and who were allegedly "damaged thereby." (Lead Plaintiffs' Memorandum of Law In Support Of Their Motion For Class Certification ("Pls.' Br.") at 1.) Notwithstanding the overwhelmingly foreign character of this action, this Court's prior rulings, binding Second Circuit precedent and foreign law, plaintiffs contend that this case "presents an ideal case for class certification." (*Id.* at 2.) Plaintiffs could not be more wrong.

First, this Court lacks subject matter jurisdiction over the claims of foreign members of the Proposed Class, who comprised the majority of Converium's shareholders. Although it was their burden to do so, plaintiffs have not shown that substantial acts in furtherance of the alleged fraud were committed in the United States and that those acts directly caused the losses they claim. On the contrary, as the Consolidated Amended Class Action Complaint (the "Complaint" or "Compl.") itself alleges, the "fraud" was supposedly conceived of and executed in Europe. Under the well-established "conduct" test, that is simply not enough. (*See* Point I.)

Second, the Class Period must end on November 19, 2002. The law is clear that reasonable reliance is an essential element of a claim for securities fraud. The law is also clear that reliance is *per se* unreasonable once the market is on constructive notice that material

misrepresentations have been made. Indeed, the Court of Appeals has squarely held that those who purchase securities after receiving constructive notice do so at their peril because, in those circumstances, there can be no claim for securities fraud as a matter of law. Here, this Court has previously held that the market was on constructive notice of Converium's alleged under-reserving practices by November 19, 2002 at the latest. The Class Period must therefore end on that date. (*See* Point II.)

Third, there is no principled basis for extending the Class Period through September 2, 2004. Plaintiffs' present contention is belied by the representations they made to this Court on defendants' motions to dismiss, when they conceded that they were aware of the alleged fraud by July 20, 2004. It is also belied by their own pleadings. As the Complaint itself alleges, the "truth [was] disclosed" on July 20, when the Company announced that reserves would be "bolstered by up to US $400 million," and the market reacted "immediately" to that announcement. (Compl. ¶ 208.) Accordingly, under no circumstances can the Class Period extend beyond July 20, 2004. (*See* Point III.)

Fourth, a class action is not a superior method for adjudicating the claims of foreign purchasers of Converium's shares. A judgment or settlement in this Court will not provide the defendants with finality because foreign purchasers will not be precluded from commencing litigation in their home countries if they are unsatisfied with the results here. What is more, there is no way to have any assurance that shareholders who did not register their shares or whose shares were held by nominees will receive adequate notice in compliance with the laws of their home countries. (*See* Point IV.)

Finally, the Class should not include purchasers who purchased Converium securities before January 7, 2002 -- *i.e.*, in Converium's December 11, 2001 Initial Public

Offering (the "IPO") or before the expiration of the post-effective "quiet period." That much is clear both from the Court of Appeals' decision in *In re IPO*, which clearly held that the market for new issues, like Converium, is not efficient until the "quiet period" expires, and from this Court's opinion of December 28, 2006, which rejected plaintiffs' prior attempt to limit *In re IPO* to its facts. It is not open to plaintiffs to revisit those issues now. (*See* Point V.)

The motion, therefore, should be denied.

FACTUAL BACKGROUND

Like plaintiffs, we understand that the Court is familiar with the underlying allegations in this action through the "extensive briefing in connection with Defendants' motions to dismiss and Lead Plaintiffs' motion for reconsideration." (Pls.' Br. at 3.) We therefore highlight only the following facts which bear upon the present motion.

A. Converium.

Converium is a Swiss multi-line reinsurance company with its principal place of business in Switzerland. The Company was created out of the third-party reinsurance business of defendant Zurich Financial Services, likewise a Swiss corporation. (Compl. ¶ 21.) Dirk Lohmann and Martin Kauer served as Converium's Chief Executive Officer and Chief Financial Officer, respectively. Both Mr. Lohmann and Mr. Kauer worked out of Converium's headquarters in Zurich, Switzerland. (*See id.* ¶ 98.)

On September 6, 2001, Zurich Financial Services ("ZFS") announced that Converium would be spun off into a separate legal entity in an initial public offering. (*Id.* ¶ 88.) The offering was a global offering of 40 million shares including the underwriters' overallotment option and included public offerings in Switzerland, the United States and elsewhere. (Prospectus at 1 (Declaration of Mary Eaton submitted in support of defendants' opposition to plaintiffs' motion for class certification ("Eaton Decl."), Ex. 28).) Because Converium was a

new foreign issuer, it was required to file its Registration Statement and a Prospectus with the Securities and Exchange Commission on Form F-1. (*See id.*, Exs. 27, 28.) On December 11, 2001, the IPO took place, and thereafter Converium shares traded on the SWX Swiss Exchange. In addition, ADSs, each representing one-half of one share, began trading on the New York Stock Exchange. (Compl. ¶ 91.) After the public offering, most of Converium's public equity traded as Swiss shares on the SWX Swiss Exchange. According to plaintiffs, only seven to ten percent of Converium's shares was represented by ADSs during the proposed Class period. (Declaration of Scott D. Hakala, PH.D, CFA Regarding Market Efficiency ("Hakala Decl.") ¶ 9 (Compendium of Exhibits To Lead Plaintiffs' Memorandum Of Law In Support Of Their Motion For Class Certification ("Compendium") Ex. 1).)

Under Converium's by-laws, shareholders have the right, but not the obligation, to register their shares. (Declaration of Livia Gallati, submitted in support of defendants' opposition to plaintiffs' motion for class certification ("Gallati Decl.") ¶ 2.) To do so, registration forms are provided to SAG SIS Aktienregister AG ("SAG"), the administrator of Converium's share register, by the customers' custodian bank. (*Id.* ¶¶ 3, 5.) Only registered shares are entitled to vote. (*Id.* ¶ 7.) Shareholders may also choose not to register their shares. (*Id.* ¶ 5.) A book entry reflecting the ownership of these shares is made in the name of the custodian banks for the benefit of their customers. (*Id*.) Only the custodian banks know the identity of the unregistered owners, and they are precluded by Swiss banking secrecy laws from disclosing the identities of the unregistered owners. (*Id.* ¶ 9.) Unregistered shares constituted a significant percentage -- between approximately 30 and 55 percent -- of Converium's publicly held Swiss shares during the proposed Class Period. (*Id.* ¶ 8.)

The vast majority of Converium's registered shares were not only traded on the SWX Swiss Exchange, but purchased by persons residing outside the United States. For example, Todd B. Hilsee, who has been retained by plaintiffs, has noted that Converium's public filings indicate that shareholders with registered addresses in the United States represented less than 25 percent of the total shares outstanding as of March 31, 2003. (Affidavit of Todd B. Hilsee On International Partial Settlement Notice Plan, submitted in connection with the preliminary approval of the settlement that Lead Plaintiffs reached with ZFS ("Hilsee Aff.") ¶ 20 (Eaton Decl., Ex. 21).) Under the laws of the foreign jurisdictions in which most of the proposed Class members reside, a judgment or settlement in this case would not be binding, and those foreign purchasers would be free to assert the same claims against defendants in their home countries. (*See* Report of Professor Adrian Briggs ("Briggs Decl.") (UK law); Declaration of Thierry Hoscheit ("Hoscheit Decl.") (Luxembourg law); Declaration of Professor Paul Oberhammer ("Oberhammer Decl.") (Swiss law); and Declaration of Riccardo Luzzatto ("Luzzatto Decl.") (Italian law), all submitted in support of defendants' opposition to plaintiffs' motion for class certification.)

This dispute then has little connection with the United States. It largely involves securities purchased by foreign purchasers of a Swiss corporation on the SWX Swiss Exchange through foreign brokers.[1] Although plaintiffs attempt to invoke the jurisdiction of this Court through claims that the alleged reserve deficiencies on which this case is based related to the Company's North American operations, the Complaint makes clear that the allegedly fraudulent decision-making occurred in Switzerland. (*See* Compl. ¶¶ 58-59, 98-100, 104-05, 123, 126, 128, 301-302.)

[1] Indeed, lead plaintiff Avalon Holdings, Inc. is incorporated in the Cayman Islands and its board met in Athens, Greece. (Eaton Decl., Ex. 24 at 26, 30-31.) It claims to have purchased all of its 200,000 shares on the SWX Swiss Exchange through a London broker. (Eaton Decl., Ex. 25 at 63, 74-75.)

B. This Court Has Already Held That Plaintiffs Were On Constructive Notice of Converium's Alleged Misrepresentations By November 19, 2002.

On December 28, 2006, this Court dismissed plaintiffs' claims under section 11 of the Securities Act of 1933 on the grounds that such claims were time-barred. In "2002 alone," the Court found, "Converium saw reserve increases of $11.6 million, $24.4 million, $59.6 million, and $70.3 million." *In re Converium Holding AG Sec. Litig.*, No. 04 Civ. 7897, 2006 WL 3804619, at *17 (S.D.N.Y. Dec. 28, 2006). These reserve increases "together amount[ed] to approximately three quarters of the reserve deficiency that plaintiffs claim Converium was carrying as of the time of its IPO." *Id.* Under controlling Second Circuit law -- including *LC Capital Partners, LP v. Frontier Ins. Group, Inc.*, 318 F.3d 155 (2d Cir. 2003) and *Shah v. Meeker*, 435 F.3d 244, 252 (2d Cir. 2006) -- "plaintiffs were on notice of Converium's alleged under-reserving practices no later than November 1[9], 2002…." *In re Converium*, 2006 WL 3804619, at *17.

Shortly after the Court issued its opinion, plaintiffs moved for reconsideration, arguing that the reserve strengthening that took place throughout 2002 did not directly relate to the misrepresentations plaintiffs alleged in their Complaint and that, in any event, the Company had reassured investors in 2003 and 2004 that its reserving issues were at an end. But the Court rejected those arguments too:

> Reconsideration of the dismissal of the Securities Act claims is denied on two independent grounds. First, the motion has been improperly used to present new facts and arguments not previously presented and to reargue matters already thoroughly considered and determined in the [December 28, 2006] Opinion. Second, even if it were appropriate to consider the new materials and arguments, the decision to dismiss the Securities Act claims would stand.

In re Converium Holding AG Sec. Litig., No. 04 Civ. 7897, 2007 WL 1041480, at *3 (S.D.N.Y. Apr. 9, 2007).

Ignoring the Court's rulings and their own pleadings, plaintiffs now ask this Court to certify a Class consisting of all those who purchased Converium stock "through September 2, 2004" (Pls.' Br. at 1), when the Company issued a press release informing the market that its credit rating had been "downgraded" the day before (Compl. ¶ 216). Earlier in this litigation, however, plaintiffs conceded that they were on notice of the alleged fraud as of July 20, 2004. (Lead Plaintiffs' Memorandum Of Law In Opposition To All Defendants' Motions To Dismiss The Consolidated Amended Class Action Complaint ("Pls.' Opp'n Br.") at 40 (Eaton Decl., Ex. 19) ("Investors Were Not Placed On Notice of Converium's Massive Reserve Deficiency Until July 20, 2004").) On that day, as the Complaint itself alleges, the Company issued a press release disclosing that it had experienced "higher than modeled US casualty loss emergence related to the underwriting years 1997 to 2001" and that reserves would therefore be "bolstered by up to US $400 million." (Compl. ¶ 208.) The Company also disclosed that it had "commissioned a leading firm of consulting actuaries to conduct a comprehensive and detailed external review" of its reserves and that the "outcome of their analysis will be communicated before the end of August." (Eaton Decl., Ex. 14.)

The market reacted "immediately" to this disclosure. (Compl. ¶ 210.) Analysts concluded that the $400 million figure was not firm, since "management provided little comfort" that the independent actuarial review "would not identify further need for strengthening," and cautioned investors that management's credibility had been severely eroded. (Eaton Decl., Ex. 12; *see* Exs. 5-11, 13.) In "direct response" to the July 20 announcement, "the price of the Company's ADSs plummeted by nearly 50%, falling $12.44 from $25.02 to $12.61 per ADS" and from 62.05 CHF to 33.25 CHF per Swiss share. (Compl. ¶ 210.) In "one day of trading"

with "extraordinarily high volumes," Converium lost "nearly $1 billion in market capitalization." (*Id.*)

ARGUMENT

Rule 23(a) provides that plaintiffs may sue as a class only if:

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representatives are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

"To qualify for certification," as this Court has previously held, "plaintiffs must prove that the proposed class action meets the four requirements of Rule 23(a)." *In re WorldCom, Inc. Sec. Litig.*, 219 F.R.D. 267, 279 (S.D.N.Y. 2003); *see also In re Initial Public Offerings Sec. Litig.*, 471 F.3d 24, 41 (2d Cir. 2006) ("*In re IPO*") ("a district court may certify a class only after making determinations that each of the Rule 23 requirements has been met").

Plaintiffs must also satisfy at least one of the prongs of Rule 23(b). *Leyse v. Corporate Collection Servs., Inc.*, No. 03 Civ. 8491, 2006 WL 2708451, at *8 (S.D.N.Y. Sept. 18, 2006) ("A plaintiff also must show that the action is maintainable under one of the three categories of Rule 23(b)"). Under Rule 23(b)(3) -- which is what plaintiffs rely upon here -- certification is permitted only if "questions of law or fact common to the members of the class predominate over any questions affecting only individual members," and if a class action is "superior to other available methods for the fair and efficient adjudication of the controversy." *Freeland v. AT&T Corp.*, 238 F.R.D. 130, 140 (S.D.N.Y. 2006); *Fed. R. Civ. P.* Rule 23(b)(3).

Conformance with the requirements of Rule 23 may not be "presumed." *In re Vivendi, S.A. Sec. Litig.*, 242 F.R.D. 76, 83 (S.D.N.Y. 2007). Rather, the "burden of proving compliance with all of the requirements of Rule 23 rests with the party moving for certification."

Freeland, 238 F.R.D. at 140.[2] To meet that burden, it is not sufficient that plaintiffs merely make "some showing" that Rule 23's requirements have been complied with. *In re IPO*, 471 F.2d at 32, 42. On the contrary, as the Court of Appeals clarified in *In re IPO*, the District Court must engage in a "rigorous analysis" to ensure that each of the prerequisites of Rule 23 has been satisfied by a preponderance of the evidence. *See id.* at 37; *see also Karvaly v. eBay, Inc.*, No. 05 Civ. 1720, 2007 WL 2580484, at *7 (E.D.N.Y. Sept. 6, 2007) (a "class may be certified only if the Court determines, by a preponderance of the evidence, that each of the Rule 23(a) and Rule 23(b)(3) factors are met"). Therefore, to the extent cases preceding *In re IPO* were decided under the "some showing" standard, they are no longer good law.[3]

Accordingly, plaintiffs cannot satisfy their Rule 23 burden by simply relying on allegations in their pleading. *Attenborough v. Construction & General Building Laborers' Local 79*, 238 F.R.D. 82, 98 (S.D.N.Y. 2006) (a court must go "beyond the pleadings…in deciding whether to certify a class"); *Cokely*, 2003 WL 1751738, at *3 (at the class certification stage, it is "clear that the plaintiffs may not rest on the pleadings alone").[4] Instead, the District Court "must receive enough evidence, by affidavits, documents, or testimony, to be satisfied that each Rule 23 requirement has been met." *In re IPO*, 471 F.3d at 41 (emphasis added). And, the "evidence supplied by plaintiffs for use by the court in its [class certification] analysis must be such that it could be received into evidence." *Cokely*, 2003 WL 1751738, at *3.

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[2] *See also Leyse*, 2006 WL 2708451, at *8 ("On a motion to certify a class, a plaintiff bears the burden of establishing each of the requirements for class certification") (internal citations omitted); *Cokely v. New York Convention Ctr. Operating Corp.*, No. 00 Civ. 4637, 2003 WL 1751738, at * 3 (S.D.N.Y. April 2, 2003) (holding that it is plaintiffs' burden to satisfy the class certification prerequisites).

[3] For this reason, the cases relied upon by plaintiffs in support of their motion for class certification that are based on the "some showing" standard are not good law. (Pls.' Br. at 4, 6-9.)

[4] Nor may the Court "assume that the allegations contained in the complaint are true when deciding a motion for class certification." *Teamsters Local 445 Freight Division Pension Fund v. Bombardier, Inc.*, No. 05 Civ. 1898, 2006 WL 2161887, at *3 (S.D.N.Y. Aug. 1, 2006) (internal citations omitted).

As the Court of Appeals has also emphasized, the fact that a Rule 23 requirement "might overlap with an issue on the merits does not avoid the court's obligation to make a ruling as to whether the requirement is met…." *In re IPO*, 471 F.3d at 27. It is the obligation of the trial court to "weigh conflicting evidence" and "resolve[] factual disputes" with respect to each component of Rule 23, notwithstanding some overlap with the merits, "just as the judge would resolve a dispute about any other threshold prerequisite for continuing a lawsuit." *Id.* at 41, 42. Accordingly, the court "disavow[ed] any suggestion … that an expert's testimony may establish a component of a Rule 23 requirement simply by being not fatally flawed." *Id.* at 42.

Applying these rules, courts in this Circuit and elsewhere have modified plaintiffs' proposed class or denied certification outright, irrespective of the complaint's allegations concerning the appropriate scope of the class. *See, e.g.*, *In re IPO,* 471 F.3d 24 (vacating certification order); *In re IPO (No. 2)*, 483 F.3d 70 (2d Cir. 2007) (upholding vacation of certification order); *Regents of the Univ. of California v. Credit Suisse First Boston (USA) Inc.*, 482 F.3d 372 (5th Cir. 2007) (vacating certification order); *Oscar Private Equity Investments v. Allegiance Telecom, Inc.*, 487 F.3d 261 (5th Cir. 2007) (vacating certification order); *Alaska Elec. Pension Fund v. Pharmacia Corp.*, No. 03 Civ. 1519, 2007 WL 276150, at *3-4 (D.N.J. Jan. 25, 2007) (shortening class period); *In re Biogen Sec. Litig*., 179 F.R.D. 25, 41 (D. Mass. 1997) (shortening class period); *Shockley v. Adams Golf, Inc.*, No. 99 Civ. 371, 2005 WL 3654346, at *1-2 (D. Del. June 27, 2005) (shortening class period); *In re LTV Sec. Litig.*, 88 F.R.D. 134, 147-48 (N.D. Tex. 1980) (shortening class period).

As we demonstrate below, plaintiffs have not established the requirements of Rule 23 by a preponderance of the evidence, as *In re IPO* mandates, with respect to most of the purchasers they purport to include in the Class.

I. THIS COURT LACKS SUBJECT MATTER JURISDICTION OVER THE CLAIMS OF FOREIGN PURCHASERS ON THE SWX SWISS EXCHANGE.

Plaintiffs have not demonstrated, as they must, that this Court has subject matter jurisdiction over the claims of foreign purchasers on the SWX Swiss Exchange. On the contrary, the bare allegations of the Complaint, on which plaintiffs rely, demonstrate that this Court does not have jurisdiction under the "conduct" test applicable in this Circuit. Accordingly, these purchasers may not be included in the Class.

A class cannot be certified that includes persons over whose claims the court does not have subject matter jurisdiction. *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 996 (2d Cir. 1975); *Nathan Gordon Trust v. Northgate Exploration, Ltd.*, 148 F.R.D. 105, 108 (S.D.N.Y. 1993) (because the court did not have subject matter jurisdiction over the claims arising from transactions on foreign exchanges, class certification was limited to transactions on the New York Stock Exchange). Yet plaintiffs attempt to do just that. In an effort to stretch this Court's jurisdiction beyond its limits, plaintiffs seek to apply the United States securities laws extraterritorially to this predominantly foreign action and to include in the Class foreign citizens who purchased shares of a foreign company on a foreign exchange. There is no meaningful nexus between any conduct by Converium in the United States and these purchasers. Absent substantial acts in furtherance of fraud committed within the United States that directly caused the alleged losses, this Court lacks subject matter jurisdiction over claims arising out of those purely foreign transactions. Indeed, given that only a small percentage of Converium's shares traded as ADSs in the United States, exercising jurisdiction over foreign purchasers of foreign shares would allow "a very small tail [to] wag[] an elephant." *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1018 n.31 (2d Cir. 1975).

A. The Jurisdictional Standard.

When confronted by predominantly foreign transactions, a court "must seek to determine whether Congress would have wished the precious resources of the United States courts and law enforcement agencies to be devoted to them rather than leave the problem to foreign countries." *Bersch*, 519 F.2d at 985. The Second Circuit has "consistently looked at two factors: (1) whether the wrongful conduct occurred in the United States, and (2) whether the wrongful conduct had substantial effect in the United States or upon United States citizens." *S.E.C. v. Berger*, 322 F.3d 187, 192 (2d Cir. 2003) (citations omitted). These factors are known, respectively, as the "conduct test" and the "effects test." *Id.* at 193.

Because this branch of defendants' opposition concerns only the foreign shareholders who purchased Converium shares on the SWX Swiss Exchange, the effects test is not at issue here. *See In re Rhodia S.A. Sec. Litig.*, No. 05 Civ. 05389, 2007 WL 2826651, at *8 (S.D.N.Y. Sept. 26, 2007) (effects test "cannot be satisfied by [f]oreign [p]laintiffs who are foreign investors who purchased shares of … a foreign corporation, on a foreign exchange"). Thus, subject matter jurisdiction over plaintiffs' claims on behalf of foreign shareholders turns on defendants' conduct within the United States.

The conduct test is met only when "(1) the defendant's activities in the United States were *more than 'merely preparatory'* to a securities fraud conducted elsewhere and (2) the activities or culpable failures to act within the United States *'directly caused' the claimed losses*. *Berger*, 322 F.3d at193 (citation omitted) (emphasis added). The Second Circuit has held that jurisdiction exists under the conduct test only if "substantial acts in furtherance of the fraud were committed within the United States." *In re Parmalat Sec. Litig.*, 497 F. Supp. 2d 526, 531 (S.D.N.Y. 2005) (quoting *Psimenos v. E.F. Hutton & Co.*, 722 F.2d 1041, 1045 (2d Cir. 1983)). Jurisdiction will not exist where the "bulk of the activity was performed in foreign countries."

IIT, 519 F.2d at 1018. Rather, to support a finding of subject matter jurisdiction, plaintiffs must demonstrate "conduct in the United States *of sufficient centrality to the claim of fraud* to warrant an exercise of such jurisdiction." *Société National d'Exploitation Industrielle des Tabacs et Allumettes v. Salomon Bros. Int'l*, 928 F. Supp. 398, 406 (S.D.N.Y. 1996) (emphasis added); *see also CL-Alexanders Laing & Cruickshank v. Goldfeld*, 709 F. Supp. 472, 479 n.3 (S.D.N.Y. 1989) (under the conduct test, "there must be some allegation that misrepresentations were made in the United States to plaintiff or were communicated from here."). It is not sufficient "to assert that offices or entities in the United States had only some involvement in the transactions at issue." *Société National*, 928 F. Supp. at 406.

It is plaintiffs who bear the burden of demonstrating subject matter jurisdiction. *See Luckett v. Bure*, 290 F.3d 493, 496-97 (2d Cir. 2002); *In re Bayer AG Sec. Litig.*, 423 F. Supp. 2d 105, 110 (S.D.N.Y. 2005). They have not done so here. Instead of presenting proof that this Court has subject matter jurisdiction over the claims of foreign purchasers, plaintiffs rely exclusively on the conclusory allegations in their Complaint. (*See* Pls.' Br. at 25-26.) The Complaint, however, does not adequately allege that defendants' activities in the United States directly caused the claimed losses; rather, those allegations demonstrate just the opposite.

B. Plaintiffs Have Failed To Demonstrate Subject Matter Jurisdiction Over The Claims Of Foreign Purchasers On The SWX Swiss Exchange.

Plaintiffs state that "this Court has subject matter jurisdiction over claims of foreign class members who purchased shares on the SWX Swiss Exchange because the allegedly fraudulent conduct that is at issue in this case *related to Converium North America's massive reserve deficiency*, and much, if not most, of that conduct occurred in the United States." (Pls.' Br. at 3 (emphasis added).) But that is not enough. Without proof of "substantial acts in furtherance of fraud" committed within the United States that "directly caused" the alleged

losses, a United States court lacks jurisdiction over the subject matter of the foreign purchasers' claims.

This case is similar to many others in which courts of this Circuit have held that there was no subject matter jurisdiction over claims of foreign purchasers of shares of foreign corporations, where the scheme was allegedly engineered on foreign soil. For example, in *Froese v. Staff*, the court found that there was no subject matter jurisdiction under the conduct test over the claims of German purchasers who purchased shares of a German company on German exchanges through German brokerage houses. No. 02 Civ. 5744, 2003 WL 21523979, at *2 (S.D.N.Y. July 7, 2003). It was alleged that the German parent company concealed its American subsidiary's practice of channel stuffing, issued press releases and an annual report in Germany misstating the American subsidiary's results, and thus fraudulently overstated revenues. *Id.* The court held that "the fraud itself occurred, if at all, when the allegedly fraudulent statements were conceived, engineered, and published in Germany," and it was those misstatements that "directly caused" the financial losses. *Id.*

Similarly, in *In re Bayer*, the court found that there was no subject matter jurisdiction under the conduct test over the claims of foreign purchasers of shares of Bayer AG, a German company, for alleged misrepresentations and omissions about the safety and commercial viability of a cholesterol-lowering drug. 423 F. Supp. 2d at 113. Plaintiffs had alleged that Bayer Corp., an Indiana corporation based in Pittsburgh and a wholly owned subsidiary of Bayer A.G., "manufactured, marketed, distributed, tested, promoted and sold" the drug at issue. *Id.* at 107. The court concluded that "'the fraud occurred if at all, when the allegedly fraudulent statements were conceived, engineered and published in Germany.'" *Id.* at 112 (quoting *Froese*, 2003 WL 21523979, at *2).

And just a few weeks ago in *In Re Rhodia*, the court held that there was no subject matter jurisdiction over the claims of foreign shareholders who purchased shares of a French company on foreign exchanges "where the alleged activities in the United States were merely the objects of fraudulent representations made abroad." 2007 WL 2826651, at *10. The court found that the alleged American activities were not the "direct cause" of foreign plaintiffs' losses. *Id.* at *11.[5]

The specific conduct alleged in the Complaint which plaintiffs contend provides a basis for subject matter jurisdiction over the claims of foreign purchasers on the SWX Swiss Exchange does not meet this standard.[6]

First, plaintiffs contend that Converium is alleged to have misrepresented the loss reserves, loss development and financial results of Converium North America. (Pls.' Br. at 25-26; Compl. ¶ 10.) These allegations are insufficient because plaintiffs do not allege that any activity that occurred in the United States directly caused the losses to the foreign purchasers.

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[5] *See also In re Nat'l Australian Bank Sec. Litig.*, No 03 Civ. 6537, 2006 WL 3844465, at *2 (S.D.N.Y. Oct. 25, 2006) (no subject matter jurisdiction where American subsidiary of Australian bank artificially inflated the value of its assets, and Australian bank presented the artificial values to its shareholders on Australia's, and other foreign, exchanges; despite the fact that the American subsidiary produced the artificially inflated results, the situs of the fraud was elsewhere); *In re Yukos Oil Co. Sec. Litig.*, 04 Civ. 5243, 2006 WL 3026024, at *10 (S.D.N.Y. Oct. 25, 2006) (dismissing foreign investors' claims for lack of subject matter jurisdiction despite allegations that defendants solicited investors in the United States through personal appearances, holding that plaintiffs did not allege any misrepresentations or omissions in connection with those solicitations).

[6] Plaintiffs themselves have recognized the seriousness of the subject matter jurisdiction problem they face. As PERSM stated with respect to Avalon's appointment as co-lead plaintiff:

> (1) "[Avalon's appointment] will expose the Class to serious arguments by defendants relating to the Court's lack of subject matter jurisdiction over the claims of foreign investors such as Avalon who purchased Converium's foreign shares on a foreign exchange"; (2) "Defendants will no doubt argue that the court has no jurisdiction over Avalon's claims under the Second Circuit's 'conduct' and 'effects' tests;" and (3) "Defendants will likely point to the fact that the underlying conduct involves the accuracy of the financial statements of a Swiss company, all of which were prepared and issued in Switzerland, by senior officers named as defendants who were based in Switzerland."

(Memorandum Of Law In Further Support Of the Motion Of The Public Employees' Retirement System Of Mississippi And In Reply To The Opposition Of The Avalon/Schmieder Group at 4-5 ("PERSM's Opp'n to Avalon") (citations omitted) (Eaton Decl., Ex. 18).)

To the contrary, plaintiffs allege that the reserving decisions and the reporting of financial results caused the losses and that these occurred in Switzerland:

- "the underlying conduct involves the accuracy of the financial statements of a Swiss company, all of which were prepared in Switzerland by senior officers named as defendants who were based in Switzerland" (PERSM Opp'n to Avalon at 4 (Eaton Decl., Ex. 18));
- Converium's Global Reserving Actuary, "who was stationed in Switzerland," along with Defendants Lohmann and Kauer (Converium's CEO and CFO in Europe), were "responsible for approving reserves established for Converium North America" (Compl. ¶ 58);
- senior management performed "other internal studies," including those by the Global Reserving Actuary, and these were provided to senior management in Switzerland (*id.* ¶ 59);
- "reserving decisions for Converium North America were specifically reviewed and approved by Converium management in Switzerland" (*id.* ¶ 98);
- "European management" exercised "extensive control" and reserving decisions were "all handled out of Switzerland" (*id.* ¶ 99);
- "Lohmann and Kauer … made the decision as to whether to strengthen reserves" (*id.* ¶ 100);
- even though Lohmann and Kauer were made aware of adverse loss developments and ever-increasing reserve deficiency in Converium North America, Lohmann and Kauer "only permitted Converium North America to book additional reserves by $5-10 million for the first two quarters of 2002," so the North American reserve deficiency increased by $90 million during that time (*id.* ¶¶ 104-105); and
- despite a massive reserve deficiency, "Lohmann determined at the beginning of 2003 that Converium would report $180 million of net income for 2003" (*id.* ¶ 123).

Second, the Complaint alleges that the decision to restructure Converium's reporting and to novate the North American policies was done to conceal the reserve deficiency. (Pls.' Br. at 26; Compl. ¶ 10.) But this decision, too, is alleged to have been made in Switzerland, not in the United States:

- "Defendant Lohmann devised a two-pronged scheme to secretly improve the appearance of Converium's North American business: first, by novating policies underwritten by Converium North America to Zurich" (Compl. ¶ 128);

- restructuring the company to de-emphasize the North American operation was the idea of Converium's Global Reserving Actuary, who "was stationed in Switzerland" (*id.* ¶¶ 58, 126);
- "Lohmann authorized the restructuring of Converium in 2003, and . . . the purpose of the restructuring was to conceal the poor performance of Converium North America and to obscure the novation plan scheme and secret reserve increases" (*id.* ¶ 301(h));
- "Lohmann devised the novation scheme and directed its implementation" (*id.* ¶ 301(i)); and
- "Kauer knew of, and assisted in or authorized the implementation of, the novation scheme and secret reserve increases" (*id.* ¶ 302 (h)).

Third, plaintiffs contend that Converium filed documents with the SEC that were false. (Pls.' Br. at 26.) The filing of such documents, however, does not confer subject matter jurisdiction. *See In re Bayer*, 423 F. Supp. 2d at 112 (stating that "SEC filings, which 'emanated from a foreign source,' amid all the other foreign representations alleged throughout the Complaint, cannot support an extension of jurisdiction over an overwhelmingly foreign putative class") (citations omitted); *Nathan Gordon*, 148 F.R.D. at 108 (a Canadian company's "mere filing of reports with the SEC and the dissemination of some materials to shareholders in the United States was merely incidental to the authorship, preparation and dissemination of the allegedly false information, all of which occurred in Canada"); *Philan Ins. Ltd. v. Frank B. Hall & Co., Inc.*, 748 F. Supp. 190, 194 (S.D.N.Y. 1990) (declining to exercise jurisdiction where "the creation and transmission of false records in and from New York . . . for the purpose of advancing the conspiracy . . . were not the actions that directly caused" plaintiffs' loss); *Kaufman v. Campeau*, 744 F. Supp. 808, 810 (S.D. Ohio 1990) (declining to exercise jurisdiction where "the inclusion of alleged misrepresentations in reports filed with the [SEC] and in statements made to the press and circulated in the United States . . . are insubstantial in comparison to conduct which allegedly occurred in Canada").

Finally, plaintiffs contend that Converium conducted earnings conference calls with Wall Street analysts who were allegedly located in the United States. (Pls.' Br. at 26; Compl. ¶ 10.) But conduct having even a greater connection with the United States has been held not to provide a basis for subject matter jurisdiction over foreign purchasers. *See, e.g.*, *In re Parmalat*, 497 F. Supp. 2d. at 536 (solicitation of U.S. investors by bank and auditor defendants insufficient to confer subject matter jurisdiction over foreign plaintiffs' claims; conduct included "marketing to U.S. investors" but such conduct "neither completed the fraud nor directly caused plaintiffs' alleged losses"); *In re Yukos*, 2006 WL 3026024, at *10 (dismissing claims of foreign investors for lack of subject matter jurisdiction despite allegations that defendants solicited investors in the U.S. through personal appearances at meetings, presentations and conferences). Plaintiffs have also not alleged how those alleged misrepresentations directly caused the losses of foreign purchasers on the SWX Swiss Exchange.

The two cases on which plaintiffs rely to support subject matter jurisdiction, *Cromer Fin. Ltd. v. Berger*, No. 00 Civ. 2284, 2003 WL 21436164, at *2 (S.D.N.Y. June 23, 2003) and *In re Flag Telecom Holdings, Ltd. Sec. Litig.*, No. 02 Civ. 3400, 2007 WL 2596775, at *24 (S.D.N.Y. Sept. 4, 2007), involved facts readily distinguishable from this case. In *Cromer*, the fraud was run from the United States and it was the decisions made in the United States that led directly to the investors' losses. That is not what is alleged here. Similarly, in *Flag Telecom*, the defendant's activities in the United States satisfied the conduct test because defendant engaged in a $20 million swap transaction in the United States to inflate its revenues artificially, and participated in a fraudulent scheme in the United States to engage in transactions with competitors to "sell" each other cable that neither needed so that each could book revenue in a flooded market. Here, Converium is not alleged to have engaged in fraudulent financial

transactions in the United States or to have participated in any fraudulent schemes here. Rather, the alleged fraud is said by plaintiffs to have been conceived and executed in Europe.

For these reasons, there is no subject matter jurisdiction over the claims of foreign purchasers on the SWX Swiss Exchange and they should be excluded from the proposed Class.[7]

II. THE CLASS PERIOD MUST END ON NOVEMBER 19, 2002 BECAUSE THE COURT HAS ALREADY HELD THAT THE MARKET WAS ON CONSTRUCTIVE NOTICE OF ALLEGED MISREPRESENTATIONS AS OF THAT DATE.

It is well-established that reliance is an essential element of a securities fraud claim because it "provides the requisite causal connection between a defendant's misrepresentation and a plaintiff's injury." *Basic Inc. v. Levinson*, 485 U.S. 224, 243 (1988). And this reliance must be "justifiable" or "reasonable." *Emergent Capital Inv. Mgmt., LLC v. Stonepath Group, Inc.*, 343 F.3d 189, 195 (2d Cir. 2003) ("For Plaintiff to prevail . . . it has to establish reasonable reliance on the alleged misrepresentations or omissions.").[8] Accordingly,

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[7] Considerations of international comity also militate against the exercise of subject matter jurisdiction over the claims of foreign purchasers. As the Supreme Court explained in *F. Hoffman-La Roche,* a case under the Sherman Act, "American's antitrust laws, when applied to foreign conduct, can interfere with a foreign nation's ability independently to regulate its own commercial affairs." *F. Hoffman-La Roche Ltd. v. Empagran, S.A.*, 542 U.S. 155, 165 (2004). The Court stated:

> [T]his Court ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations. . . This rule of statutory construction cautions courts to assume that legislators take account of the legitimate sovereign interest of other nations when they write American laws. It thereby helps the potentially conflicting laws of different nations work together in harmony--a harmony particularly needed in today's highly interdependent commercial worked.

Id. at 164. Applying U.S. securities laws to securities transactions by foreign citizens on a foreign exchange through foreign brokers would unnecessarily impinge upon the regulatory regime in Switzerland. *See Blechner v. Daimler-Benz,* 410 F.Supp.2d 366, 370 (D. Del. 2006) (declining to exercise jurisdiction recognizing that "other nations may have a greater interest in regulating people and activities within their borders"); c*f. Torres v. S. Peru Copper Corp.*, 965 F. Supp. 899, 908-09 (S.D. Tex. 1996) (dismissing case on ground of international comity where "[t]he challenged activity and alleged harm occurred entirely in Peru; enforcement in Peru of any judgment by [the District Court] [was] questionable. . . and exercise of jurisdiction by this Court would interfere with Peru's sovereign right to control its own environment and resources.").

[8] *See also Chavin v. McKelvey*, No. 98 Civ. 9574, 1999 WL 491879 (2d Cir. July 9, 1999) ("plaintiffs must prove detrimental reliance that was reasonable."); *Harsco Corp. v. Segui*, 91 F.3d 337, 342 (2d Cir. 1996) ("The general rule is that reasonable reliance must be proved as an element of a securities fraud claim.");

the essential element of justifiable reliance cannot be met where plaintiff had actual knowledge of the purported fraud. *In re Adelphia Commc'ns Corp. Secs. & Derivative Litig.*, No. 03 Civ. 7301, 2007 WL 2615928, at *6 (S.D.N.Y. Sept. 10, 2007) (dismissing 10b-5 claims where there was "no legal authority supporting [plaintiffs'] proposition that a securities purchaser aware of fraud and misstatements can selectively rely on statements not yet disavowed without falling awry of 10b-5's bar against recovery by reckless investors. Plaintiffs here actually knew that a fraud perpetrated" and purchased anyway). Likewise, reliance is *per se* unreasonable where plaintiff had constructive notice that the statements at issue were false. *See Frigitemp Corp. v. Financial Dynamics Fund, Inc.*, 524 F.2d 275, 282 (2d Cir. 1975) ("there is widespread agreement among the courts that constructive knowledge of truth or omitted information will bar plaintiff from 10b-5 recovery") (quoting 2 A. Bromberg, *Securities Law: Fraud - SEC Rule 10b-5*, § 8.4 (1974)).[9]

Indeed, once plaintiffs are on "inquiry notice" of material misrepresentations, they "cannot succeed with a separate fraud claim for stock purchases after that date" because it is "unreasonable" as a matter of law "to rely on the market price" of the stock. *Shah v. Meeker*, 435 F.3d 244, 252 (2d Cir. 2006). That is precisely the case here.

Steed Fin. LDC v. Nomura Sec. Int'l, Inc., No. 00 Civ. 8058, 2004 WL 2072536, at *8 (S.D.N.Y. Sept. 14, 2004) ("A showing of justifiable reliance is essential to sustain a securities fraud claim."). The rule is the same in other circuits. *See Banca Cremi, S.A. v. Alex. Brown & Sons, Inc.*, 132 F.3d 1017, 1028 (4th Cir. 1997) (a plaintiff's failure to prove that it justifiably relied on a broker's alleged omission or misstatement is necessarily fatal to a securities fraud claim); *Paracor Finance, Inc. v. General Elec. Corp.*, 96 F.3d 1151, 1159 (9th Cir. 1996) ("Justifiable reliance is a limitation on a rule 10b-5 action which insures that there is a causal connection between the misrepresentation and the plaintiff's harm.") (internal quotations omitted); *One-O-One Enter., Inc. v. Caruso*, 848 F.2d 1283, 1286 (D.C. Cir. 1988) (plaintiffs' "allegations must indicate that their reliance on the allegedly fraudulent representations was reasonable") (citing *Kennedy v. Josephthal & Co.*, 814 F.2d 798, 804 (1st Cir. 1987)).

9 *See also Mallis v. Bankers Trust Co.*, 615 F.2d 68, 80-81 (2d Cir. 1980) ("[I]f plaintiff has the means of knowing, by the exercise of ordinary intelligence, the truth, or the real quality of the subject of the representation, he must make use of those means, or he will not be heard to complain that he was induced to enter into the transaction by misrepresentations.") (internal citations omitted); *In re Livent, Inc. Noteholders Sec. Litig.*, 151 F. Supp. 2d 371, 439 (S.D.N.Y. 2001) ("if basic inquiries would have revealed the truth, the [Noteholders] could not have reasonably relied on defendants' alleged misrepresentations by which they claim to have been misled.").

As this Court has already held, plaintiffs were on inquiry notice of Converium's alleged under-reserving practices no later than November 19, 2002. *In re Converium Holding AG Sec. Litig.*, 2006 WL 3804619, at *17. By that point, Converium had already booked reserve-related charges which "together amount[ed] to approximately three quarters of the reserve deficiency that plaintiffs claim Converium was carrying as of the time of its IPO." *Id.* "In 2002 alone, Converium saw reserve increases of $11.6 million, $24.4 million, $59.6 million, and $70.3 million. Taking Converium North America in isolation yields still higher figures: $39.9 million, $19.9 million, $47 million, and $70.3 million over the same period." *Id*. In addition, Standard & Poor's and Moody's both downgraded the Company, with a Standard & Poor's analyst noting that the strengthening made it clear that "long-tail exposures" -- or claims submitted long after the date on which the policies covering those losses had been written -- posed ongoing problems for the company and the industry. *Id.* at *17 n.20.

These disclosures were sufficient to afford plaintiffs "actual knowledge of the facts giving rise to the action or notice of the facts, which in the exercise of reasonable diligence, would have led to actual knowledge." *Id.* at *15 (quoting *Shah*, 435 F.3d at 249). The disclosures were classic "storm warnings" which suggested to investors of "ordinary intelligence" that a wrongdoing at Converium was "probable, not merely possible." *Id.* at *16 (quoting *Shah*, 435 F.3d at 249 and *Lentell v. Merrill Lynch & Co.*, 396 F.3d 161, 169 (2d Cir. 2005)).

Indeed, held the Court, this case presents facts "strikingly similar" to the *LC Capital* case, which "governs the outcome here." *Id.* at *16. Although plaintiffs urged the Court to distinguish *LC Capital* on the grounds that, throughout 2003 and into 2004, Converium management purportedly "assured investors" that any reserve issues had been "fully addressed"

(Pls.' Opp'n Br. at 41 (Eaton Decl., Ex. 19); *see* Memorandum Of Law In Support Of Lead Plaintiffs' Motion For Reconsideration ("Pls.' Recons. Mot.") at 7-11 (Eaton Decl., Ex. 20)), their argument was swiftly rejected:

> *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*.

Id. at *17 (quoting *LC Capital*, 318 F.3d at 155-56) (emphasis added). Accordingly, the Court held that plaintiffs were "on notice of Converium's alleged under-reserving practices no later than November 1[9], 2002," and therefore had constructive knowledge of Converium's alleged misrepresentations as of such date. *Id.* at *17.

Under *Shah*, that ruling is dispositive here.

In *Shah*, lead plaintiff for a putative class of holders of Morgan Stanley stock brought suit under section 10(b) of the Exchange Act against Morgan Stanley, one of its analysts, Mary Meeker, and others. Lead plaintiff claimed that defendants' failure to disclose allegedly improper business practices with regard to the issuance of analyst reports for investment banking clients artificially inflated the price of Morgan Stanley stock, and sought relief on behalf of a putative class of purchasers of Morgan Stanley stock between July 1, 1999 and April 10, 2002. 435 F.3d at 245. The trial court held that lead plaintiff was on inquiry notice by May 2001, more than two years before filing suit, and dismissed the complaint as time-barred. *Id.* On appeal, lead plaintiff for the putative class challenged the trial court's ruling on inquiry notice and argued that, even if some of his claims were time-barred, claims based on purchases that took place after the alleged storm warnings were not. *Id.* at 251.

The Court of Appeals disagreed. Citing *LC Capital*, it upheld the trial court's ruling that claims based on purchases prior to May 2001 were time-barred. *Id.* at 249. As to purchases made after that point (May 2001 through April 2002), the Court continued:

> Because Shah was on inquiry notice of Morgan Stanley's alleged fraudulent practices as of May 14, 2001, he cannot succeed with a separate fraud claim for stock purchases made after that date; it was unreasonable to rely after May 2001 on the market price of Morgan Stanley stock. *See Frigitemp Corp. v. Financial Dynamics Fund*, 524 F.2d 275, 282 (2d Cir. 1975) ("[I]f the plaintiff has been furnished with the means of knowledge and he is not prevented from using them he cannot say he has been deceived by the misrepresentations of the other party.").

Id. at 252.[10]

Any argument that plaintiffs may make that this Court's prior opinion on the motion to dismiss is not binding in connection with the present motion would have no merit. First, this Court's finding that the market was on constructive notice of alleged misrepresentations as of November 2002 is not only correct, it is now the law of the case. *See Arizona v. California*, 460 U.S. 605, 618 (1983) (the law of the case doctrine "posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case"). Where a motion to dismiss is granted, that becomes the law of the case. *See In re Bisys Sec. Litig.*, 496 F. Supp. 2d 384, 386 (S.D.N.Y. 2007) (dismissing motion to amend pleading to add defendant previously dismissed from case on motion to dismiss); *Van Syckle v. C.L. King & Assocs., Inc.*, 822 F. Supp. 98, 106 (N.D.N.Y. 1993) (dismissing claim in amended pleading previously dismissed on motion to dismiss). Here, plaintiffs have already had not one, but two, opportunities to address the issue of their

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[10] *See also Alaska*, 2007 WL 276150, at *3 (investors "could no longer reasonably rely" on defendants' statements following issuance of FDA data release); *Zobrist v. Coal-X, Inc.*, 708 F.2d 1511, 1519 (10th Cir. 1983) ("when we impute to Phil Rasmussen knowledge of the warnings contained in the Private Placement Memorandum, it becomes clear that, as a matter of law, his reliance on the misrepresentations was not justified.").

constructive knowledge: first, on defendants' motion to dismiss and second, on plaintiffs' motion for reconsideration. (Pls.' Opp'n Br. at 37-43 (Eaton Decl., Ex. 19); Pls.' Recons. Mot. at 7-11 (Eaton Decl., Ex. 20).) Even after considering "new facts and arguments not previously presented" by plaintiffs on the motion to dismiss, the Court maintained its original conclusion. *In re Converium*, 2007 WL 1041480, at *3. It is not open to plaintiffs to attempt to challenge that finding for a third time.

Second, the fact that the Court's finding was made in the context of determining whether plaintiffs' Securities Act claims were time-barred does not alter the result either. As *Shah* squarely holds, there can be no claim for securities fraud under the Exchange Act where the market has already been placed on inquiry notice because it would be "unreasonable" for any investor to rely on a company's supposed misrepresentations in such circumstances. *Shah*, 435 F.3d at 252.

Accordingly, the Class Period must end on November 19, 2002.

III. UNDER NO CIRCUMSTANCES CAN THE CLASS PERIOD EXTEND BEYOND JULY 20, 2004 BECAUSE PLAINTIFFS HAVE ALREADY CONCEDED THAT THE FRAUD WAS REVEALED THAT DAY.

Plaintiffs seek to include in the Class not only purchasers after November 19, 2002, but also purchasers after July 20, 2004 (until September 2, 2004). If the storm clouds had gathered by November 19, 2002, the Complaint itself makes crystal clear they had erupted into a thunderstorm by July 20, 2004.

On July 20, 2004, the Complaint alleges that the Company issued a press release disclosing that it had experienced "higher than modeled US casualty loss emergence related to the underwriting years 1997 to 2001" and that reserves would therefore be "bolstered by up to US $400 million." (Compl. ¶ 208.) That reserve strengthening, in turn, "trigger[ed] net impairments of up to US $289 million of Deferred Tax Assets and US $94 million of Goodwill

in the balance sheet of Converium Reinsurance (North America) Inc." *Id.* The Company also disclosed that it had "commissioned a leading firm of consulting actuaries to conduct a comprehensive and detailed external review" of its reserves. (Eaton Decl., Ex. 14.) The market reacted "immediately" to this disclosure. (Compl. ¶ 210.) Analysts concluded that the $400 million figure was not firm, since "management provided little comfort" that the independent actuarial review "would not identify further need for strengthening." (Eaton Decl., Ex. 12; *see* Exs. 5-11, 13.) In "direct response" to the July 20 announcement, "the price of the Company's ADSs plummeted by nearly 50%, falling $12.44 from $25.02 to $12.61 per ADS." *Id.* In "one day of trading" with "extraordinarily high volumes," Converium lost "nearly $1 billion in market capitalization." (Compl. ¶ 210.)

Despite these allegations, plaintiffs ask this Court to certify a class consisting of all those who purchased Converium stock "through September 2, 2004 . . . ." (Pls.' Br. at 1.) On that day, the Company issued a press release informing the market that Standard & Poor's and A.M. Best had "downgraded their credit ratings of the Company" the day before. (Compl. ¶ 216.) Plaintiffs nowhere explain how they selected this date; their brief is silent on the issue. (*See* Pls.' Br. at 4-30.) Evidently, plaintiffs seek to expand the putative Class period so as to include so-called "vulture investors" -- purchasers who gambled that the market had over-reacted to the July 20 announcement and hoped to pick up a bargain. But any such effort to expand the Class Period to September 2 should be rejected.

First, by July 20, the Complaint itself alleges that the "truth" had been "disclosed." (Compl. ¶ 71.)[11] The Complaint does not allege that Converium's July 20 disclosure was fraudulent or that the fraud that supposedly took place before then somehow had

[11] Avalon sold its Converium stock immediately following the July 20 announcement. (Eaton Decl., Ex. 26 at 40-42).

continued. Nor does it allege that any of the disclosures made after July 20 were fraudulent.[12] (*See* Compl. ¶¶ 212-16.) On the contrary, the last supposedly fraudulent statement for which plaintiffs have sued took place on April 29, 2004, when the Company disclosed that "it had increased reserves by $43 million during the first quarter of 2003." (Compl. ¶¶ 201, 202, 292.)

Second, even before the July 20 announcement, numerous analysts had sounded alarms about the Company's reserve situation and questioned management's credibility with respect to this issue. (*See* Eaton Decl., Ex. 2 at 1-2, Ex. 3 at 1, Ex. 4 at 1-2.)

And, following the July 20 announcement, analysts warned investors in no uncertain terms that any reassuring statements from Converium were not to be believed. In a July 20, 2004 report -- which is quoted in the Complaint -- J.P. Morgan stated: "We believe that management credibility is at issue as assurances have repeatedly been given in the past that US casualty reserving issues have largely been addressed." (Compl. ¶ 211.) Other reports issued on the heels of the July 20 announcement were equally critical.[13]

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[12] The Complaint alleges that further disclosures concerning the Company's reserves were made on August 30, 2004, causing the price of the stock to decline further. (*See* Compl. ¶ 215.) This press release disclosed a number of developments, including the Company's decision to commence a $420 million rights offering (Eaton Decl., Ex. 15, at 1), which would have had a substantially dilutive impact on existing shareholders. As noted above, the Complaint does not allege that the July 20 disclosure was fraudulent or that the August or September releases corrected that disclosure.

[13] Bear Stearns, in a report entitled "Lack of Visibility," cautioned: "There is scope for further [reserve] hits…." (Eaton Decl., Ex. 8, at 1.) Cheuvreux reported a "further dent to management credibility" and downgraded the stock. (*Id.*, Ex. 5 , at 2.) Merrill Lynch concluded that "management's credibility has been significantly damaged (perhaps irreparably)." (*Id.*, Ex. 11, at 1.) Natexis Bleichroeder's report, headed "disastrous effects guaranteed," noted management's responsibility for making "wayward judgments" and advised investors that management's "purposeful declarations will no longer suffice …." (*Id.*, Ex. 7, at 1.) Pictet & Cie, citing Converium's track record of adding to reserves since the IPO, noted that Converium's statements should not be given "much credibility." (*Id.*, Ex. 13, at 2.) Other analysts likewise warned that Converium's troubles were far from over. For example, in a report entitled "Reserve increase saps management credibility," Citigroup emphasized the fact that S&P had downgraded the company, with all ratings placed on Creditwatch with negative implications. (*Id.*, Ex. 9, at 1, 3.) Commerzbank noted that Converium represents a "significant risk" and that it "would take a brave investor to look through the S&P downgrade . . . and an ongoing external actuarial investigation . . . " to invest in this issue. (*Id.*, Ex. 6, at 2.) And Lombard Odier Darier Hentsch urged investors to "reduce," cautioning that Converium's rating will be further cut if it does not raise capital. (*Id.*, Ex. 10, at 1, 3.)

Third, plaintiffs' present contention as to the length of the Class period is belied by the representations they made to this Court during briefing on defendants' motion to dismiss. At that time, they conceded that they were aware of the alleged fraud as of July 20. (Pls.' Opp'n Br. at 40 (Eaton Decl., Ex. 19) ("Investors Were Not Placed On Notice of Converium's Massive Reserve Deficiency Until July 20, 2004").) "The fact is," they claimed then, "that, prior to July 20, 2004, Lead Plaintiffs and the members of the class were unaware that Converium was under-reserved …." (*Id.* at 37.)[14]

Last, and in any event, there is no principled basis for selecting September 2 as an appropriate cut-off date and plaintiffs have not suggested one. On that date, Converium disclosed that A.M. Best and Standard & Poor's had downgraded their credit ratings of the Company the day before. (Compl. ¶ 216.) While plaintiffs maintain that such a downgrade was a foreseeable result of the Company's reserve strengthenings, that is not a proper foundation for setting the class period. Plaintiffs' own allegations make clear that the "truth had been revealed" by July 20. The actions by the rating agencies on September 1, 2004 do not change that fact.[15]

IV. A CLASS ACTION IS NOT A SUPERIOR METHOD FOR ADJUDICATING FOREIGN PURCHASER CLAIMS.

Plaintiffs acknowledge that, under Rule 23(b)(3), they must prove that a "class action is superior to other available methods for the fair and efficient adjudication of the controversy." (Pls.' Br. at 11.) They have made no such showing with respect to foreign

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[14] In addition, other members of the Class plaintiffs purport to represent alleged that the Class Period should close on July 20. For example, in *Meyer*, plaintiff sought to represent a class of persons who purchased Converium stock through July 20, alleging that the truth emerged on that date. *See* First Amended Class Action Complaint, *Meyer v. Converium Holding AG*, No. 04 Civ. 07897 (MBM) (S.D.N.Y), at 6 (Eaton Decl., Ex. 17).

[15] What is more, the rating agencies downgraded Converium for numerous reasons apart from the Company's reserving actions, including "the planned reduction of consolidated premiums and the restructuring of the North American operations, as well as the successful raising of the proposed USD 420 million via a share issue." (Eaton Decl., Ex. 16, at attachment 1, at 2.)

purchasers on the SWX Swiss Exchange. A judgment or settlement in this Court will not provide the defendants with finality. Foreign purchasers will not be precluded from commencing litigation in their home countries if they are not satisfied with the results here. And, even if some foreign purchasers could be included in the proposed Class, plaintiffs have not established a basis to include such purchasers holding unregistered shares or whose shares were held by nominees.

A. A U.S. Judgment Or Settlement Would Not Have Preclusive Effect In The Home Countries Of Most Of The Proposed Class Members.

For a class action to be a superior method for adjudicating this controversy, any judgment rendered must have preclusive effect in the foreign jurisdictions where most of Converium's shareholders reside. Plaintiffs contend that this requirement can be satisfied by showing that there is "more than a 'possibility'" that this Court's judgment will be afforded *res judicata* effect in these countries. (Pls.' Br. at 29.) But such a minimal showing would provide defendants with no certainty or even likelihood of finality. Even if plaintiffs could satisfy their burden by merely establishing that it is more likely than not that foreign jurisdictions will recognize the judgment of this Court -- the alternative standard plaintiffs propose -- they have not done so. The proof submitted here by the parties makes clear that it is virtually, if not actually, certain that this Court's judgment will not be recognized in the home countries of most foreign class members.

1. The Applicable Legal Standard.

In *Bersch*, the Second Circuit refused to affirm the district court's certification of a class containing predominantly foreign members where the evidence demonstrated that those

class members would not be bound by any judgment or settlement.[16] 519 F.2d at 997. In holding that it had no jurisdiction, the Court noted the "serious problem [created by] the dubious binding effect of a defendants' judgment (or a possibly inadequate plaintiffs' judgment) on absent foreign plaintiffs or the propriety of purporting to bind such plaintiffs by a settlement." *Id.* at 986. As the Court observed,

> [W]hile an American court need not abstain from entering judgment simply because of a possibility that a foreign court may not recognize or enforce it, the case stands differently when this is a near certainty. This point must be considered not simply in the halcyon context of a large recovery which plaintiff visualizes but in those of a judgment for the defendants or a plaintiffs' judgment or settlement deemed to be inadequate.

Id. at 996.[17]

Most recently, in *Kern v. Siemens Corp.*, 393 F.3d 120, 129 n.8 (2d Cir. 2004), the Second Circuit expressed "significant doubts whether without [an] 'opt-in' provision - or perhaps even with that provision - plaintiffs' class is 'superior to other available methods for the fair and efficient adjudication of the controversy,' as Rule 23(b)(3) would require it to be." *Kern* was a class action brought on behalf of heirs and representatives of victims of an Austrian ski train fire. The District Court ordered an opt-in provision because an opt-out class would not be bound under Austrian law. The Court of Appeals noted that "defendants understandably argued that a class action in American courts on behalf of foreign victims would be merely advisory and therefore not superior to other methods of adjudication." *Id.* Because the Court of Appeals found that the opt-in provision violated Rule 23, it concluded that "we need not decide whether

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[16] In *Bersch*, putative class members included residents of Canada, Australia, England, France, Germany, Switzerland and many other countries in Europe, Asia, Africa and South America. 519 F.2d at 978.

[17] Although the Court found that defendants had shown that it was nearly certain that a judgment or settlement would not be binding on foreign class members, the Court did not hold that the defendants bore the burden of proof on this issue. Recently, in *In re Vivendi*, 242 F.R.D. at 95, the court noted that after *In re IPO*, plaintiffs bear the burden of proof.

the District Court correctly found that the [opt-in] provision resolved concerns about the asserted inefficiency of the proposed class." *Id.*

Courts in this Circuit have often refused to certify classes comprised mostly of foreign members because they do not satisfy the superiority requirement. For example, in *CL-Alexanders Laing & Cruickshank v. Goldfeld*, 127 F.R.D. 454 (S.D.N.Y. 1989), Judge Mukasey held that the "class action forum is not superior to joinder," because, among other reasons, "all the class members are British, and British law does not afford defendants *res judicata* protection against class members in an 'opt-out' kind of class." *Id.* at 455. Judge Mukasey came to the same conclusion in *Ansari v. New York Univ.*, 179 F.R.D. 112, denying plaintiff's motion for class certification. The court indicated that "what limited case law there is on this issue suggests that at least six of the prospective class members are residents of countries that would not accord preclusive effect to the class action Ansari proposes."[18] 179 F.R.D. at 117 (S.D.N.Y. 1998); *see also In re Assicurazioni Generali, S.p.A. Holocaust Inc. Litig.*, 228 F. Supp. 2d 348, 364 (S.D.N.Y. 2002) ("[I]t would be unfair to certify a class with a significant European membership, in part because that class would not be precluded from litigating abroad in their home countries should they lose in this forum."); *Del Fierro v. PepsiCo, Int'l*, 897 F. Supp. 59, 64 (E.D.N.Y. 1995) (dismissing action by foreign plaintiffs in part because "a judgment for PepsiCo would not bar foreign class members from relitigating the same issues in the Philippines").[19]

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[18] In *Ansari*, putative class members included residents of 11 foreign countries, including Great Britain, Italy, Germany and India. 179 F.R.D. at 112.

[19] *See also In re DaimlerChrysler AG Sec. Litig.*, 216 F.R.D. 291, 301 (D. Del. 2003) (excluding foreign shareholders under a Rule 23 superiority analysis and certifying class of only domestic investors, noting "the practical difficulties involved in maintaining a class comprising foreign investors," and stating that plaintiffs did not adequately address concerns regarding "class management and damages suffered by purchasers on foreign exchanges").

Recently, Judge Holwell addressed the superiority requirement in a class action involving foreign shareholder claims. *In re Vivendi*, 242 F.R.D. 76. The Court explained:

> With regard to an evaluation of the risk of nonrecognition, the Court does not find the "near certainty" standard to be a particularly useful analytical tool. In [*Bersch*, 519 F.2d at 996], Judge Friendly found, based on unopposed affidavits that nonrecognition was almost certain; however, there is no indication that only this degree of certitude calls into question the superiority of a class action. Nor is it likely that only where nonrecognition is a "mere possibility" ought a court find superiority to be established. It seems more appropriate, instead, to evaluate the risk of nonrecognition along a continuum. *Where plaintiffs are able to establish a probability that a foreign court will recognize the res judicata effect of a U.S. class action judgment, plaintiffs will have established this aspect of the superiority requirement. See In re IPO Sec. Litig.*, 471 F.3d at 33 (placing burden on plaintiff not just to produce "some evidence" of compliance with Rule 23, but to show that its requirements are met). *Where plaintiffs are unable to show that foreign court recognition is more likely than not, this factor weighs against a finding of superiority* and, taken in consideration with other factors, may lead to the exclusion of foreign claimants from the class. The closer the likelihood of non-recognition is to being a "near certainty," the more appropriate it is for the Court to deny certification of foreign claimants.

Id. (emphasis added).[20]

Mentioning none of these cases other than *In re Vivendi*, plaintiffs contend that they have "satisfied the test enunciated in *Cromer* by showing that there is more than a 'possibility' that this Court's judgments will be afforded *res judicata* effect in these countries." (Pls.' Br. at 29.) While plaintiffs' showing is not even sufficient to meet that standard, their burden is much higher. Such a standard would afford defendants no meaningful protection against re-litigation of the same claims that are being made here. *See In re IPO*, 471 F.2d at 42

[20] After analyzing the competing declarations of the parties' foreign law experts, the court concluded that plaintiffs had met their burden with respect to the law of England, France and the Netherlands, but had not met their burden with respect to the law of Germany and Austria. *In re Vivendi*, 242 F.R.D. at 105.

(it is not sufficient that plaintiffs merely make "some showing" of compliance with Rule 23). And such a standard is inconsistent with the binding effect requirement of Rule 23.

2. Plaintiffs Have Failed To Prove That Foreign Courts Would Recognize The *Res Judicata* Effect Of A U.S. Judgment Or Settlement.

Relying upon several foreign law declarations,[21] plaintiffs contend that they have "satisfied the analogous test enunciated in *In re Vivendi* by showing that it is, in fact, probable that the courts of these countries will either recognize or be guided by the judgments of this Court." (Pls.' Br. at 29.)[22] Even if meeting this standard were sufficient, the declarations that plaintiffs have submitted fall far short of demonstrating a probability that those countries[23] will give preclusive effect to this Court's judgment or a Court-approved settlement. In any event, defendants have submitted expert declarations of leading practitioners, academics and jurists from Great Britain, Switzerland, Luxemburg and Italy, the countries in which most of the foreign

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[21] These include Switzerland, Luxemburg, Italy, Germany, Sweden and Singapore. Plaintiffs have presented no evidence as to the preclusive effect that would be accorded a U.S. class action judgment in any other country.

[22] Plaintiffs specifically advised the Court that they would not be submitting foreign law evidence on this issue. At a pre-trial conference on January 25, 2007, the subject of whether plaintiffs would utilize foreign law experts in connection with this motion was specifically discussed. In response to a query from the Court, "[are] the plaintiffs planning to rely on expert testimony in moving for class certification?", counsel for PERSM replied: "we're likely to have one expert in connection with class certification that would probably be an expert on market efficiency; in other words, an expert who would opine as to when the market for Converium securities became efficient . . . that is the contemplated expert that we would have at class certification." (Eaton Decl., Ex. 23, at 8.) The Court then clarified: "[s]o no expert on the foreign purchaser issue?" Counsel for PERSM replied: "[o]nly to the extent that expert would be saying the market for the -- the Swiss market, the Swiss exchange was also efficient, but that would be it. Correct." (*Id.*). At no time prior to September 28, 2007, when they served their class certification motion, did plaintiffs give any indication they had changed their minds.

[23] Although the proof of foreign law submitted here is different than that submitted in *In re Vivendi*, plaintiffs contend that this Court should accept Judge Holwell's conclusions in that case that a U.S. class action judgment or settlement would "more likely than not" be given preclusive effect by courts in Great Britain, the Netherlands and France (at the same time they contend that Judge Holwell was wrong with respect to German law). (Pls.' Br. at 27.) The decision in *In re Vivendi*, based on an entirely different record, is not binding here. Indeed, as noted above, the Second Circuit and other courts have reached different conclusions from those reached in *In re Vivendi* on this issue. *See Bersch*, 519 F.2d at 978 (no preclusive effect in Canada, Australia, England, France, Germany, Switzerland and many other countries in Europe, Asia, Africa and South America); *Ansari*, 179 F.R.D. at 112 (no preclusive effect in eleven foreign countries, including Great Britain, Italy, Germany and India); *CL-Alexanders*, 127 F.R.D. at 455 (no preclusive effect in England).

putative Class members holding registered shares are likely to reside. These declarations completely undercut plaintiffs' showing.[24]

Luxembourg

Plaintiffs have submitted the declaration of Veronique De Meester ("De Meester Decl."), who concludes that "[i]f a foreign judgment meets the conditions for regularity set out by the rules of Luxembourg private international law, it can be recognized/declared enforceable if so applied for by one party." (*Id.* ¶ 14 (Compendium Ex. 7).) However, most of this declaration appears to have been copied almost word for word from a declaration submitted by another lawyer in another case (without any mention of this fact) (Eaton Decl., Ex. 22), seriously undermining the credibility of Ms. De Meester's opinion. (*See* Hoscheit Decl. ¶ 3.) Indeed, the Court should disregard the De Meester declaration altogether. *See, e.g., In re Jackson Nat'l Life Ins. Co. Premium Litig.*, No. 96 MD 1122, 2000 WL 33654070, at *2 (W.D. Mich. Feb. 8, 2000)

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[24] From the materials that plaintiffs have submitted, these are the four countries together with the United States in which a large percentage of Converium's registered shareholders are likely to have resided. (Hilsee Aff. at 6, 8-11 (Eaton Decl., Ex. 21).) Plaintiffs also contend that a small but not minimal number of registered shares during the proposed Class period were held by residents of Singapore and Germany. Defendants do not believe that registered shareholders in Singapore and Germany purchased a significant amount of allegedly damaged shares and, therefore, have not submitted rebuttal declarations concerning those countries (or Sweden).

In any event, the declarations submitted by plaintiffs do not establish a probability that a U.S. class action judgment or settlement would have preclusive effect. Per-Olov Sköld admits that "a U.S. securities class action judgment will not have formal *res judicata* effect" in Sweden. (Declaration of Per-Olov Sköld ("Sköld Decl.") ¶ 5 (Compendium Ex. 9).) He contends that it will have only persuasive effect. (*Id.* ¶ 28.)

Professor Tan Cheng Han admits there is no clear authority that establishes that a U.S. class action judgment will be enforceable in Singapore. (Declaration Of Professor Tan Cheng Han, SC ("Tan Decl.") ¶ 7 (Compendium Ex. 8).) Prof. Tan states that "courts in Singapore will enforce the judgment of a foreign court which had proper jurisdiction over the parties . . . ." (*Id.* ¶ 8.) Notably, he does not state that a U.S. court would have jurisdiction over unnamed class members, particularly the Government of Singapore, which plaintiffs contend held five percent of Converium's shares at one point. (*Id.* ¶ 6.)

Kristian Heiser states that "although U.S. class actions have no German equivalent, there are good arguments to support recognition of a U.S. class action judgment/settlement with regard to the preclusive effect on class members domiciled in Germany." (Declaration of Kristian J. Heiser ("Heiser Decl.) at 2 (Compendium Ex. 5).) Mr. Heiser admits that there is a relatively recent decision by a Stuttgart court refusing to give *lis pendens* effect to a U.S. class action, although he characterizes it as dictum. (*Id.* at 17.) Mr. Heiser further admits that this is the only "German judgment expressing an opinion on enforceability of U.S. class action judgments." (*Id.*)

(precluding testimony by plaintiffs' expert because there were "undeniable substantial similarities between [the expert's] report and the report of another expert prepared with assistance from the same counsel in an unrelated case").

Defendants have submitted the declaration of Luxembourg law expert Thierry Hoscheit. Mr. Hoscheit has written and lectured extensively on Luxembourg procedural law. (Hoscheit Decl. ¶ 2.) He has also served as a judge where he dealt with, first-hand, the recognition and enforcement of foreign judgments under Luxembourg law. (*Id.*) He concludes that a Luxembourg court would not recognize or enforce a U.S. class action judgment or settlement because such an action would violate the procedural, property and freedom of association rights guaranteed by Luxembourg law and also because a U.S. court would not have jurisdiction over the claims of Luxembourg class members unless they consent (which would not be established by a failure to opt out). (*Id.* at Exec. Summary and ¶¶ 4-64.) Therefore, it would have no preclusive effect against unnamed Luxembourg class members. (*Id*. ¶¶ 4, 64.) He also opines that Ms. De Meester has misconstrued or misapplied Luxembourg law. (*Id.* ¶ 6, 13, 14, 43, 45, 46.)

Switzerland

Plaintiffs have submitted the Declaration of Daniel Tunik ("Tunik Decl."), who concludes that the law is "not settled" in Switzerland as to whether unnamed class members domiciled in Switzerland who do not take an active role in the U.S. proceedings would be bound. (*Id.* ¶ 73 (Compendium Ex. 10).) Although he states that there are no "judicial precedents" and this question "is disputed," he believes "that there are good reasons -- and strong support in the law -- to support the view that unnamed class members would be bound by the class action judgment provided that they had actual knowledge of the class action and were granted a real

opportunity to opt out." (*Id.*) He concedes that the Swiss lawyer Isabelle Romy has written the leading article about this subject and disagrees with him. (*Id.* ¶ 25, 29, 44, 45.)

Defendants have submitted the declaration of Professor Paul Oberhammer, who is a noted scholar in Switzerland on issues of procedural law. He concludes that a Swiss court would refuse to recognize the *res judicata* effect of a judgment or settlement in a U.S. class action against unnamed Swiss class members. (Oberhammer Decl. ¶¶ 9, 73.) He reasons that (i) the U.S. court would not have jurisdiction over Swiss class members who never made an appearance and never responded to a notice informing them of a right to opt out, (ii) recognition of such an action would violate Swiss procedural law, and (iii) unnamed Swiss class members would not be considered "parties" to the U.S. action for *res judicata* purposes. (*Id.* ¶¶ 7, 8-45.) He further opines that Mr. Tunik's declaration is incorrect in several important respects and that several of his key conclusions are unsupported. (*Id.* ¶¶ 46-73.)

England

As noted above, plaintiffs have offered no evidence that an English court would grant preclusive effect to a U.S. class action judgment or settlement. Nonetheless, the defendants have submitted the declaration of Adrian Briggs. Adrian Briggs is an esteemed English law scholar. He has been a member of the academic staff of the Faculty of the Law of the University of Oxford since 1980 and has published extensively on issues of private international law. (Briggs Decl. ¶ 4.) He concludes that "Converium could not use a class-action judgment, whether on the merits in its favour or as the result of a settlement, to preclude English Shareholders from litigating their individual claims in the English courts. This answer is a near certainty, as English law is completely clear and settled." (*Id.* ¶ 8.)

Prof. Briggs also addresses the *In re Vivendi* decision in which the court certified a class including shareholders from England. He explains that arguments of the plaintiffs' English law expert there, Prof. Jonathan Harris, were "seriously misconceived" and at times, "absolutely wrong." (*Id.* ¶ 2.) He notes as follows:

> Professor Harris appears to believe that as long as a defendant submits to the jurisdiction of a court, all parties (or maybe deemed parties) to the proceedings become bound by the decision of the court. It is a position which defies logic and rationality at the same time. . . . The proposition that a person may be estopped as a result of actions taken, exclusively, by his opponent in litigation is manifestly untenable. Whether a person who is said to be party to foreign proceedings is or is not estopped from contradicting the judgment given in those proceedings is determined by his *own* acts in relation to the court. Not otherwise. Moreover, the proposition which Professor Harris advances is contradicted by the Court of Appeal in *A/S D/S Svendborg v. Wansa* [1997] 2 Lloyd's Rep. 183.

(*Id.* ¶¶ 22-23.) He concludes that the *In re Vivendi* court's decision was improperly, but understandably, influenced by Prof. Harris's erroneous arguments. (*Id.* at Point VI (¶10).)

Italy

Plaintiffs have submitted the Declaration of Dario Trevisan ("Trevisan Decl."). Mr. Trevisan does not indicate that he has ever worked on the enforcement in Italy of foreign judgments. (*See id.* ¶ 1 (Compendium Ex. 6).) Mr. Trevisan concludes that a U.S. class action judgment or settlement "could be" enforceable in Italy. (*Id.* ¶ 30.) He acknowledges that there is no precedent on this issue. (*Id.* ¶ 13.)

Defendants have submitted the declaration of Italian law expert Professor Riccardo Luzzatto of the Faculty of Law of the State University of Milan. Prof. Luzzatto teaches both Public and Private International Law, and is also a practicing lawyer in Milan admitted to the Italian Superior Courts. (Luzzatto Decl. ¶ 1.) In both capacities, Prof. Luzzatto has dealt extensively with issues concerning conflict of laws and jurisdiction. (*Id.*) He is also an editor of

the only Italian periodical entirely devoted to private international law. (*Id.*) Prof. Luzzatto concludes that an Italian court would not give preclusive effect to a U.S. class action judgment or court-approved settlement against an Italian class member who received class notice but did not opt out of the class, because to do so would violate Italian constitutional law.[25] (*Id.* ¶¶ 5, 30.) He also explains the respects in which Mr. Trevisan's opinion is flawed. (*Id.* ¶¶ 31-42.)

In sum, plaintiffs have not demonstrated by a preponderance of the evidence that foreign purchasers will be precluded from commencing litigation in their home countries with respect to the matters at issue in this case.

B. Foreign Shareholders Who Did Not Register Their Shares Or Whose Shares Were Held By Nominees Will Not Be Bound.

Converium's shareholders have the right to register their shares, but are not required to do so. (Gallati Decl. ¶¶ 2, 5, 9.) The decision to register shares can be made at any time after shares are purchased. (*Id.* ¶ 5.) To register shares, the shareholder must complete and execute registration forms and provide those forms to SAG, which maintains the Company's share registry. (*Id.*) Only registered shares are entitled to vote. (*Id.* ¶ 7.) Custodian banks are reflected as the owner of unregistered shares in the share registry. (*Id.* ¶ 9.) Only the custodian banks know the identity of the unregistered owners. (*Id.*) Swiss banking secrecy laws prevent

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[25] Plaintiffs also contend that even if foreign courts would not enforce a judgment, a class action would still be superior. (Pls.' Br. at 29.) They rely principally on this Court's observation in *Cromer* that "many events would have to occur before Deloitte would be prejudiced by an inability to assert the defense of *res judicata* successfully." 205 F.R.D. at 135 n.32. But the possibility that these events may not occur is insufficient to satisfy plaintiffs' burden to show superiority. As the court in *Bersch* concluded, it was not a "satisfactory answer" that defendants might be protected even if they could not assert *res judicata* in foreign countries. *Bersch*, 519 F.2d at 997. Additionally, the possibility that defendants may not be prejudiced does not alter the fact that defendants would now be placed in a no-win situation in which even if they prevail, or the case is settled, they face the prospect of litigation by dissatisfied foreign class members.

Plaintiffs further rely on Judge Sweet's observation in *In re Lloyd's Am. Trust Fund Litig.*, No. 96 Civ. 1262, 1998 WL 50211 at *15 (S.D.N.Y. Feb. 6, 1998), that the Court could fashion a proof of claim mechanism likely to bind participating class members. (Pls.' Br. at 30.) However, if defendants prevail, no proof of claim mechanism will be needed and consequently could not prevent re-litigation by disappointed class members. And, if the case is settled, a proof of claim mechanism will not prevent re-litigation by foreign class members who do not submit claim forms.

the banks from disclosing the identities of the unregistered owners. (*Id.*) Unregistered shares constituted a significant percentage -- between 30 and 55 percent -- of Converium's publicly held Swiss shares during the class period. (*Id.* ¶ 8.) Notably, plaintiffs' brief does not even mention Converium's unregistered shares or address the notice problems that this will create.

It seems clear that there is no effective way to ensure that notice is given in a manner likely to inform unregistered shareholders of this action and their right to opt out or that is sufficient under the laws of countries in which many of those shareholders are likely to reside. In the first place, plaintiffs cannot demonstrate that it is feasible to provide notice either personally or by mail to unregistered shareholders because neither Converium nor SAG can determine their identities and addresses. If notice were mailed to the custodian banks with a request to transmit the notice to the unregistered owners, there could be no assurance that the custodian banks still maintained updated records identifying owners that had previously sold their shares or that the banks transmitted the notices to the shareholders.[26]

We assume that plaintiffs will propose some form of published notice. However, it will not be possible to ensure or to confirm that published notice to foreign purchasers of unregistered shares reached its intended targets. For example, because even the nationality of unregistered owners cannot be ascertained, it will not be possible to determine with any degree of reliability in which cities or countries the notice should be published. Even if it is assumed that the unregistered shareholders reside in the same places as registered owners, there is no way to know whether the shareholders will actually see the published notice or whether they will read

[26] This Court would not have jurisdiction over the custodian banks and would have no ability to compel them to send the notice. It can be expected that foreign custodian banks and nominees who are less accustomed to dealing with U.S. class actions would be less likely to comply with a request to transmit a notice to their customers than would nominees in the United States.

it. The shareholders would have to read the right page of the right publication in the right language published in the right city in the right country on the right day.

If the foreign purchasers do see the notice, there is no reason to expect they will understand it or respond. Class actions do not exist for the most part outside of the United States. Given the likelihood that foreign purchasers will have little familiarity with class actions, there is no reason to expect that those who actually see and read a notice appearing in a newspaper will understand it. And if they do understand it, they would feel little compulsion to opt out in light of the general rule that silence does not equal consent.[27]

Further, even if all of this worked perfectly and the published notice was read and understood by unregistered shareholders, there would be virtually no way as a practical matter for the defendants to prove this.[28]

Finally, plaintiffs have not shown that published notice (and even notice mailed to custodian banks or nominees) would be sufficient as a matter of local law in a number of the countries in which foreign shareholders are likely to reside. Swiss law, for example, would not recognize these methods of service. (*See* Oberhammer Decl. at ¶¶ 9, 22-39.) In the very limited circumstances in which Luxemburg law would allow published notice, it would require the

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[27] Many of the same problems that would be faced in reaching unregistered shareholders would be present with respect to foreign registered shares held by nominees.

[28] We recognize that publication is a constitutionally acceptable means in this country of notifying class members under certain circumstances. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) (notice by publication constitutionally sufficient as to trust beneficiaries whose names and addresses are unknown). In non-international class actions, this principle provides defendants with substantial assurance that the notice will bind absent class members even if they do not receive it or understand it. *See Weinberger v. Kendrick*, 698 F.2d 61, 71 (2d Cir. 1982) (notice of class action settlement by publication in the *Wall Street Journal* sufficient even though some class members failed to receive actual notice). This would not be the case with respect to shareholders in other countries. It cannot be expected that a foreign court would find that one of its citizens was bound when he or she did not even receive notice. Even plaintiffs' experts have not opined that shareholders who did not receive notice would be bound. Indeed, they have said the opposite. (*See, e.g.*, Tunik Decl. ¶ 73 (Compendium Ex. 10) (assuming "actual notice"); Heiser Decl. at 2, 18,19 and ¶ 3.3 (Compendium Ex. 5) (assuming "effective notice"); Skold Decl. ¶ 21 (Compendium Ex. 9) (requiring "proper and sufficient" notice).)

specific identification of the party being notified which would not be possible in the case of unregistered shareholders and nominees. (*See* Hoscheit Decl. at ¶¶ 10-15.)

C. Notice To Foreign Class Members Could Not Be Given In Compliance With Rule 23.

Rule 23(c)(2)(B) provides that notice to class members must concisely and clearly state in plain, easily understood language, among other things, "the binding effect of a class action judgment on class members under Rule 23(c)(3)." Because a judgment would not be binding -- or even if it "might" be binding as plaintiffs contend -- on foreign class members, it will not be possible to direct a notice to such class members that complies with this rule.

V. THE PROPOSED CLASS SHOULD NOT INCLUDE PURCHASERS WHO PURCHASED IN THE IPO OR PRIOR TO JANUARY 7, 2002 BECAUSE THE MARKET WAS NOT EFFICIENT PRIOR TO THAT DATE AS A MATTER OF LAW.

In their brief (Pls.' Br. at 2, 13-20) and through the declaration of their purported market efficiency expert, Scott Hakala, plaintiffs seek to re-litigate whether the market at the time of Converium's IPO and during the post-effective period (the "quiet period") was efficient, thus ignoring the controlling precedent in this Circuit, *In re IPO*, 471 F.3d at 24, 42-43, as well as this Court's explicit reliance on that law in prior decisions in this case. Plaintiffs' efforts should be rejected and the Court should exclude from the Class purchasers who purchased in the IPO or prior to January 7, 2002, the first trading day following the end of the "quiet period" during which the market for Converium shares remained inefficient.

Plaintiffs acknowledge, as they must, that in order to meet the "predominance" requirement of Rule 23(b)(3), they, like the plaintiffs in *In re IPO*,[29] must take advantage of the

[29] Noting that the plaintiffs invoked the fraud-on-the-market presumption to satisfy predominance, the Court in *In re IPO* stated: "Plaintiffs recognize that they must establish that they relied on the misrepresentations that they have alleged, and they also recognize that establishing reliance individually by members of the class would defeat the requirement of Rule 23 that common questions of law or fact predominate over

fraud-on-the-market presumption of reliance and, that to do so, they must demonstrate that the market for Converium shares was efficient at the time of the IPO and during the "quiet period" which followed it. (Pls.' Br. at 13.)[30] They then, however, engage in a tortured reading of both *In re IPO* and the Court's December 28, 2006 opinion in this case in an attempt to avoid the clear ruling in *In re IPO* that the market in an IPO and in the "quiet period" following it is inherently inefficient as a matter of law. To do so, plaintiffs try to limit the Second Circuit's ruling that "the market for IPO shares is not efficient" only to the specific facts presented in *In re IPO* (Pls.' Br. at 15-18), and totally ignore this Court's description of that ruling as "broad" and one that cannot be "cabined, as the plaintiffs suggest, by specific facts in *In re IPO* or its procedural posture." 2006 WL 3804619 at *13 (S.D.N.Y. 2006). They focus instead on this Court's statement that it was unnecessary to decide whether there were any facts which, if properly pleaded, would be sufficient to allege the existence of an efficient market for an initial public offering because plaintiffs' allegations of reliance in the Complaint were insufficient. *Id.*

Neither of these end runs works. First, with respect to the holdings in *In re IPO*, it is clear from the face of the Court of Appeals' opinion that it was not saying the markets for IPO shares of the issuers involved in that case were inefficient based on facts peculiar to those cases. Rather, after reviewing many of the same sorts of argument plaintiffs make here, the Court of Appeals expressly stated that "the market for IPO shares is not efficient," continuing:

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questions affecting only individual members. . . . [W]ithout the [fraud-on-the-market] presumption, individual questions of reliance would predominate over common questions." 471 F.3d at 42-43.

[30] *See Basic v. Levinson*, 485 U.S. at 246-247; *Freeman v. Laventhol & Horwath*, 915 F.2d 193 ("The fraud on the market theory cannot be applied logically to securities that are not traded in efficient markets."); *In re Towers Fin. Corp. Noteholders Litig.*, No. 93 Civ. 0810, 1995 WL 571888 at *21 (S.D.N.Y. Sept. 20, 1995); *Reingold v. Deloitte Haskins & Sells*, 599 F. Supp. 1241, 1264 (S.D.N.Y. 1984); *Teamsters Local 445*, 2006 WL 2161887, at *5. "[T]he court may not merely presume the facts in favor of an efficient market." *Bell v. Ascendant Solutions Inc.*, 422 F.3d 307, 312 (5th Cir. 2005) (citing *Unger*, 401 F.3d at 323). Plaintiffs have the burden of proving that the market was efficient during the entire class period before the presumption may apply. *See Gariety v. Grant Thorton, LLP*, 368 F.3d 356, 367-68 (4th Cir. 2004).

> As the late Judge Timbers of our Court has said, sitting with the Sixth Circuit, "[A] primary market for newly issued [securities] is not efficient or developed under any definition of these terms." *Freeman v. Laventhol & Horwath*, 915 F.2d 193, 199 (6th Cir. 1990) (internal quotation marked omitted); accord *Berwecky v. Bear, Stearns & Co.*, 197 F.R.D. 65, 68 n.5 (S.D.N.Y. 2000) (The fraud-on-the-market "presumption can not logically apply when plaintiffs allege fraud in connection with an IPO, because in an IPO there is no well-developed market in offered securities."). As just one example of why an efficient market, necessary for the *Basic* presumption to apply, cannot be established with an IPO, we note that during the 25-day "quiet period," analysts cannot report concerning securities in an IPO, see 17 C.F.R. §§ 230.174(d), 242.101(b)(1), thereby precluding the contemporaneous "significant number of reports by securities analysts" that are a characteristic of an efficient market. *See Freeman*, 915 F.2d at 199.

In re IPO, 471 F.3d at 42-43. Plaintiffs, therefore, are just plain wrong when they assert that the Court of Appeals in any way limited its ruling that the market for shares in an IPO and in the "quiet period" was inefficient as a matter of law.

Further, this Court correctly described the Court of Appeals' ruling, stating that in *In re IPO*:

> [t]he court refused to accept the fraud on the market assumption in the context of securities law claims based on trading in IPO shares, and found that issues of an individual investor's reliance would predominate over the common questions in a class action. *Id.* In so holding, the court relied on, *inter alia*, *Freeman v. Laventhol & Horwath*, 915 F.2d 193 (6th Cir. 1990), which reviewed in detail the theoretical underpinnings for the fraud on the market presumption in a well-developed secondary market. *Id.* at 199. *Freeman* also explained why a primary market for newly issued securities, in which "the price of newly issued securities is set primarily by the underwriter and the offeror, not by the market," cannot benefit from that presumption.

In re Converium, 2006 WL 3804619, at *13.

Second, although not mentioned at all in plaintiffs' brief, the Court's April 9, 2007 opinion in this case expressly stated that:

> Plaintiffs have not moved for reconsideration of the dismissal of the Exchange Act Section 10(b) claim against ZFS or the Exchange Act Section 10(b) claim brought by purchasers in the IPO against Converium and the Officer Defendants.

2007 WL 1041480, at *1 (emphasis added).

Thus, as a result of the Court's December 28, 2006 and April 9, 2007 opinions, it is also the law of the case[31] that there was no efficient market for trading in the Converium IPO and "quiet period" and, not having sought reconsideration of that determination, plaintiffs cannot be heard to introduce supposed further "evidence" disputing that holding now.[32]

Moreover, even if this Court could entertain Mr. Hakala's opinions (which, as discussed above, it cannot), his "evidence" contributes nothing toward a showing that trading in the IPO and during the "quiet period" was efficient, let alone meets plaintiffs' burden to do so. First of all, as is apparent throughout his declaration, Mr. Hakala proceeds on a sleight-of-hand basis, citing SEC filings,[33] purported market reactions to important news about the Company and issuance of Converium press releases and information "regarding its earnings, reserves, guidance

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31 *See* Point II, *supra*, at 23-24, as to the import of the law of the case doctrine.

32 In this context, plaintiffs' coy suggestion (Pls.' Br. at 15, n.7) that if the Court now finds the "facts" submitted in support of their motion give rise to a presumption of reliance, plaintiffs "are of course prepared to amend the Complaint to make those facts part of the operative pleading" is remarkable at best and clearly should be dismissed out of hand.

33 Ironically, Mr. Hakala suggests that the Company's ability to register securities pursuant to "Form F-1s" was a sign that the market in Converium shares was efficient. (Hakala Decl. ¶ 5 (d) (Compendium Ex. 1).) In *Freeman* (cited by both the Court of Appeals and this Court in assessing IPO market efficiency), Judge Timbers, in carefully reviewing the five factors identified in *Cammer v. Bloom*, 711 F. Supp. 1264, 1276 n.17 (D.N.J. 1989), as useful in proving that a security was traded in an efficient market, specifically noted the eligibility of the Company to file an S-3 Registration Statement (the equivalent of an F-3 Registration Statement by foreign issuers). 915 F.2d at 199. Converium, by contrast, as a new company selling its shares for the first time was required instead to file a far more detailed Form F-1 (the equivalent of an S-1). *Compare* Form F-1, 70 F.R. 44772 *with* Form F-3, 70 F.R. 44722. The SEC has explained that its varied registration statement requirements, each with different disclosure items, are based on the view that securities of different ages do not trade in equally efficient markets. *See, e.g.*, Securities Act Rel. No. 6235, 20 SEC Docket 1339 (Sept. 2, 1980), available at 1980 WL 20867, at *3 (1980) (because S-3 registrants already have a history of periodic reporting under the Exchange Act, "[t]o the extent that the market . . . acts efficiently, and this information is adequately reflected in the price of a registrant's outstanding securities, there seems little need to reiterate this information in a prospectus in the context of a distribution"). The same logic applies to foreign registrants.

and commercial developments" (Pls.' Br. at 4), as well as a significant number of analysts' reports as if all of these occurred or existed simultaneously with the start of trading in the IPO and during the "quiet period," rather than after the "quiet period" ended.

With respect to the efficiency of the market at the time of the IPO and the "quiet period," all Mr. Hakala has to offer is speculation that information about a "spin-off" such as Converium available prior to the start of trading in its stock is somehow different from information about other new registrants provided in "road shows" or other promotional materials or opportunities. He does not explain why. Rather, he points to what he believes to be a fairly consistent trading price of Converium shares in the period from the start of trading to the end of the "quiet period," but in doing so, he neglects to tell the Court about underwriter stabilization of the stock during this period as allowed by SEC Regulation M (*see* 17 C.F.R. § 242.104), or point to the disclosure in the Prospectus that such stabilization might be undertaken. (Prospectus at 193) (Eaton Decl., Ex. 28).)[34]

Finally, Mr. Hakala refers to only one analyst report, that of HSBC Investment Bank plc in London dated December 13, 2001, actually issued during the "quiet period." (Hakala Decl. ¶ 6 (Compendium Ex. 1).) This is hardly the "existence of a significant number of reports by securities analysts" of which *Freeman*, 915 F.2d at 199, speaks. Moreover, the HSBC report itself is quite explicit in explaining that it is based solely on the Prospectus and that under applicable Swiss law, Converium has not provided any guidance or comments, since it is precluded from doing so for 25 days after the IPO.[35] (Eaton Decl., Ex. 1.) The report also lists restrictions on its distribution in the United States and elsewhere. (*Id.* at 16).

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[34] Notably, the "event study" proffered by Mr. Hakala does not purport to include analyst reports referencing ZFS's spin-off of Converium or similar information issued before the IPO became effective.

[35] As a result of the interplay between Swiss and U.S. law, the Prospectus also provided for an even broader requirement for the delivery of the Prospectus than required under U.S. law alone:

In sum, under the Court of Appeals' ruling in *In re IPO*, as a matter of law there is no efficient market for trading in the IPO or in the 25 day "quiet period" after it. The Class, therefore, should exclude purchasers who purchased in the IPO or prior to January 7, 2002.

CONCLUSION

For the foregoing reasons, defendants respectfully submit that plaintiffs' motion for class certification should be denied.

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Until January 5, 2002, all dealers that buy, sell or trade our shares or ADSs, whether or not participating in this offering, may be required to deliver a prospectus. This is in addition to the dealers' obligation to deliver a prospectus when acting as underwriters and with respect to their unsold allotments or subscriptions.

(Prospectus at "Contents" page (Eaton Decl., Ex. 28).)