UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

GREGORY A. STEVENSON, as a shareholder of CREDIT SUISSE GROUP AG on behalf of CREDIT SUISSE GROUP AG shareholders, Plaintiff, vs. RICHARD E. THORNBURGH, *et al.*, Defendants.	Case No. 23 Civ. 4458 CM (SLC) Class Action

NICOLE LAWTONE-BOWLES, as a shareholder of CREDIT SUISSE GROUP AG on behalf of CREDIT SUISSE GROUP AG shareholders, Plaintiff, vs. RICHARD E. THORNBURGH, *et al.*, Defendants.	Case No. 23 Civ. 4813 CM (SLC) Class Action

Plaintiffs' Omnibus Memorandum of Law in Opposition to Defendants' Motions to Dismiss the Amended Class Action Complaint

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Table of Abbreviations

ADS	American Depositary Share
Archegos	Archegos Capital Management
Bank	Credit Suisse Group AG
BNY Mellon	Bank of New York Mellon
Board	Credit Suisse Group AG Board of Directors
Chang	Declaration of Albert Y. Chang in Support of Plaintiffs' Opposition to Defendants' Motions to Dismiss the Amended Class Action Complaint, dated October 27, 2023
Class	All persons who held Credit Suisse common stock, including ordinary shares and ADSs, between October 22, 2013 and March 17, 2023, and suffered loss/damage due to Defendants' actionable conduct, by continuing to hold or disposing of their shares.
Class Members	Members of the Class
Class Period	From October 22, 2013 to March 17, 2023
CO	The Swiss Code of Obligations
Complaint	Plaintiffs' Amended Class Action Complaint, initially filed in a redlined form on July 14, 2023 (Dkt. No. 33-1) and re-filed in a "clean" form on September 14, 2023 (Dkt. No. 60)
Conduct Code	Credit Suisse Group AG Code of Conduct
CPC	The Swiss Code of Civil Procedure
CPLR	New York Civil Practice Law and Rules
Credit Suisse Defendants	Credit Suisse Entity Defendants and Credit Suisse Individual Defendants
Credit Suisse Enerprise	Credit Suisse Entity Defendants and KPMG LLP
Credit Suisse Entity Defendants	Credit Suisse Holdings (USA), Inc.; Credit Suisse Securities (USA) LLC; Credit Suisse Capital LLC; and Credit Suisse Management LLC

Credit Suisse Individual Defendants	Defendants Richard E. Thornburgh, Brady W. Dougan, John G. Popp, Brian Chin, Jay Kim, Mirko Bianchi, John Tiner, Severin Schwan, Iris Bohnet, Lydie Hudson, Kaikhushru S. Nargolwala, Seraina Macia, Joaquin J. Ribeiro, Michael Klein, James L. Amine, Eric Varvel, David L. Miller, David R. Mathers, Lara J. Warner, Timothy P. O'Hara, Robert S. Shafir, Pamela A. Thomas-Graham, Sean T. Brady, Robert Jain, and Philip Vasan
CSGAG	Credit Suisse Group AG
DC	District of Columbia
Director Defendants	Doyle, Thornburg, Macia, Klein, Bianchi, Ribeiro, Rohner, Tiner, Schwan, Bohnet, and Nargolwala
DLJ	Donaldson Lufkin & Jenerette
DOJ	U.S. Department of Justice
EDNY	Eastern District of New York
Fed	Federal Reserve System
FINMA	The Swiss Financial Market Authority
FINRA	U.S. Financial Industry Regulatory Authority
FINMA	Swiss Financial Market Authority
FNC	*Forum Non Conveniens*
FOREX	The foreign exchange currency market
GOL	New York General Obligations Law
Greensill	Greensill Capital
Internal Controls	Controls over financial, accounting, legal and regulatory compliance, including risk management procedures
KPMG Defendants	KPMG LLP and the KPMG Individual Defendants

KPMG Individual Defendants	Defendants Paul Knopp, Laura M. Newinski William Thomas, Larry Bradley, John B. Veihmeyer, David Middendorf, Scott Marcello, Thomas Whittle, Brian J. Sweet, Cynthia Holder and Jeffrey Wada
KPMG International	KPMG international network of firms
KPMG RICO Defendants	Scott Marcello, David Middendorf, Thomas Whittle, Cynthia Holder and Jeffrey Wada
NYAG	New York State Office of the Attorney General
NYDFS	New York Department of Financial Services
NYC	New York City
NY	New York
Officer Defendants	Mathers, Hudson, Amine, O'Hara, Shafir, Warner, Hudson, Thomas-Graham, Brady, Jain, Vasan, Dougan, Varvel, Popp, Chin, Kim, Sohn, Miller and Cerutti
Perucchi	Declaration of Dr. Leandro V. Perucchi in Support of Plaintiffs' Opposition to Defendants' Motions to Dismiss the Amended Class Action Complaint, dated October 27, 2023
PCAOB	Public Company Accounting Oversight Board
Plaintiffs	Plaintiff Gregory A. Stevenson in Case No. 23 Civ. 4458 and Plaintiff Nicole Lawtone-Bowles in Case No. 23 Civ. 4813
PSLRA	Private Securities Litigation Reform Act of 1995
PwC	PricewaterhouseCoopers
RICO	Racketeer Influenced and Corrupt Organizations Act of 1970
RICO Defendants	Credit Suisse Entity Defendants, Credit Suisse Individual Defendants, KPMG LLP, and KPMG RICO Defendants
RCS	Plaintiffs' RICO Case Statement
SDNY	Southern District of New York

UBS	UBS Group AG
UK	The United Kingdom

PRELIMINARY STATEMENT[1]

[T]he demise of Credit Suisse has been "entirely self-inflicted by years of mismanagement and an epic destruction of … shareholder value."[2]

This class action arises from the decades-long mismanagement of Credit Suisse. On behalf of all holders of Credit Suisse common stock between Oct. 22, 2013 and Mar. 17, 2023, two US-citizen Plaintiffs assert direct damage claims under federal RICO and the Swiss CO. ¶¶ 1–2.[3] Dwarfing in scale the infamous collapses of Enron, WorldCom and AOL-Time Warner combined, the mismanagement of Credit Suisse and the criminal conduct of Defendants caused billions in damages to its shareholders, including US/NY-resident investors who owned over 540 million shares. Plaintiffs allege misconduct by three groups of defendants:

- Credit Suisse's four NY-based subsidiaries that manage its US/Americas operations;[4]

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[1] This opposition is based on the Declaration of Dr. Leandro V. Perucchi, the Declaration of Albert Y. Chang and Plaintiffs' July 21, 2023 RCS. Plaintiffs' RCS provides an overview of the RICO claims (RCS at 1–10) and detailed:

- why each RICO defendant is liable, *i.e.*, Credit Suisse Defendants (*id.* at 11–15) and KPMG Defendants (*id.* at 15–16);
- the RICO predicate acts and how they formed a pattern of conduct (*id.* at 13–19, 20–21);
- the underlying criminal convictions, including the RICO Defendants committed "bank fraud" (*id.* at 30–33);
- the RICO enterprise and its operation (*id.* at 22–24);
- the RICO course of conduct and conspiracy (*id.* at 25–30); and
- the separate damage and causation to the property of Plaintiffs and Class Members, *i.e.*, Credit Suisse common shares (*id.* at 30).

[2] Elliot Smith, *Fail or Sale? What Could Be Next for Stricken Credit Suisse*, CNBC, Mar. 18, 2023.

[3] The Complaint was initially filed in a redlined form on July 14, 2023 (Dkt. No. 33-1) and was re-filed in a "clean" form on September 14, 2023 (Dkt. No. 60). The allegations in the Complaint are cited as "¶ ___." All emphases in quoted texts are added.

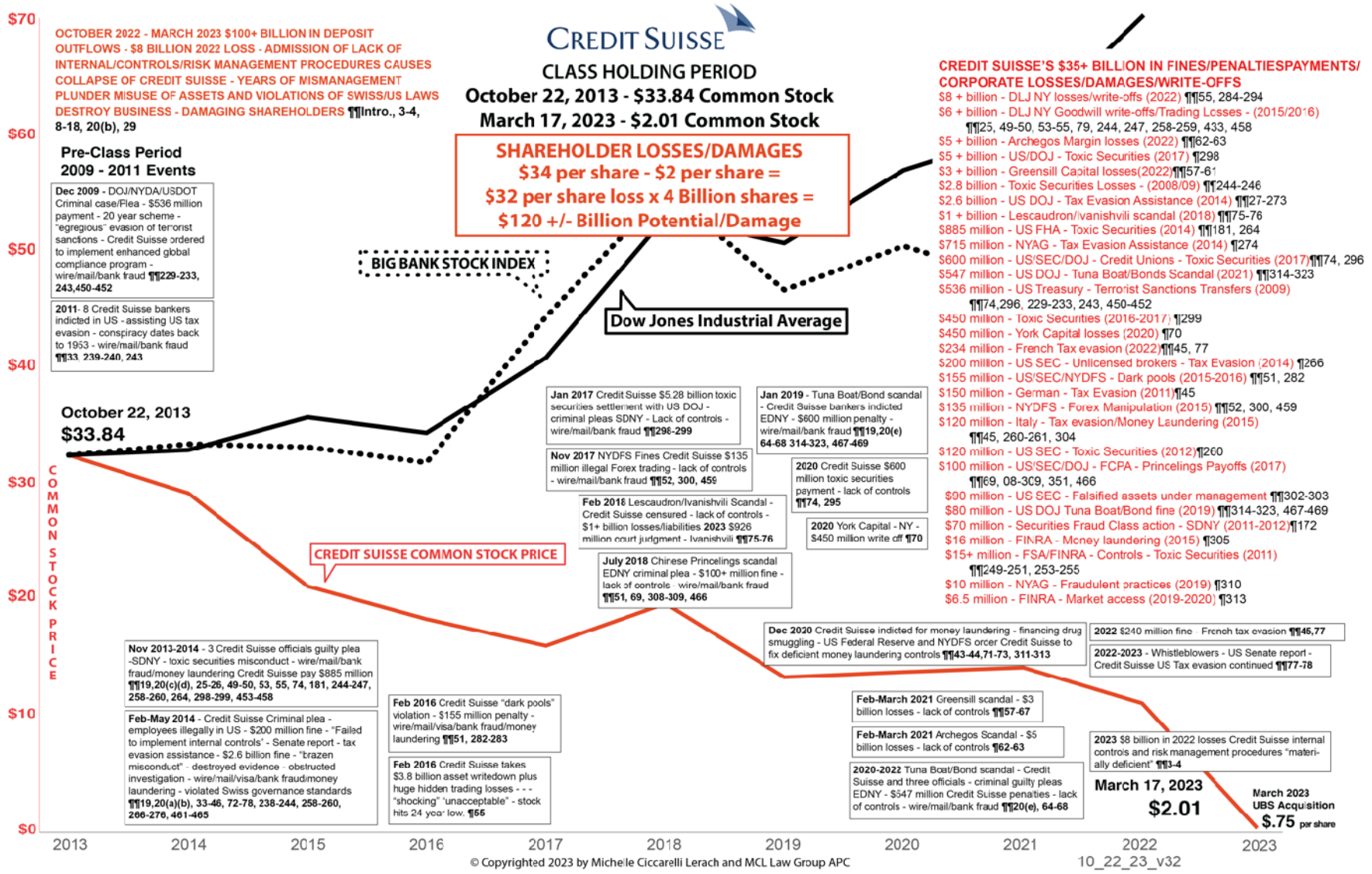
[4] CSGAG is not named a defendant, but is included in the term "Credit Suisse" when the context so requires. As stated in CSGAG's 2022 Annual Report, the term "Credit Suisse" means "[CSGAG] and its consolidated subsidiaries." ¶ 1 & n.3. CSGAG is legally responsible for the liabilities of its subsidiaries, and is obligated to indemnify their present and former directors and executives. Such liabilities are assumed by UBS, as Credit Suisse's corporate successor.

- Credit Suisse officials, members of its Board and Executive/Management Board ("Executives"), most of whom are US citizens/residents; and

- NY-headquartered KPMG LLP, as well as 11 KPMG US-based individuals, all NY citizen/residents, who participated in auditing Credit Suisse's annual accounts, acting as consultants and advisors, participating in the management of Credit Suisse.

Due to Defendants' failure to fulfill their Swiss law duties and follow Credit Suisse's own Conduct Code, and the RICO predicate criminal acts they caused (*i.e.*, participated in, permitted, or rewarded), Credit Suisse suffered repeated investigations, proceedings and convictions. This resulted in over $35 billion in fines, penalties, losses and write-downs to Credit Suisse. In addition to damaging Credit Suisse, Defendants' misconduct also ***caused Credit Suisse's common stock — the property of Plaintiffs and Class Members — to fall from $33.84 on Oct. 23, 2013 to $2.01 on Mar. 17, 2023***, damaging those shareholders. ¶¶ 3–4, 8–9. This scandal is Credit Suisse-specific. As its stock collapsed, other banks' shareholder values soared. ¶¶ 4, 10.

[An enlarged copy of the visual on page 3 below is submitted as Exhibit A to this memorandum.]


OCTOBER 2022 - MARCH 2023 $100+ BILLION IN DEPOSIT OUTFLOWS - $8 BILLION 2022 LOSS - ADMISSION OF LACK OF INTERNAL/CONTROLS/RISK MANAGEMENT PROCEDURES CAUSES COLLAPSE OF CREDIT SUISSE - YEARS OF MISMANAGEMENT PLUNDER MISUSE OF ASSETS AND VIOLATIONS OF SWISS/US LAWS DESTROY BUSINESS - DAMAGING SHAREHOLDERS ¶¶Intro., 3-4, 8-18, 20(b), 29
CREDIT SUISSE
CLASS HOLDING PERIOD
October 22, 2013 - $33.84 Common Stock
March 17, 2023 - $2.01 Common Stock
SHAREHOLDER LOSSES/DAMAGES
$34 per share - $2 per share =
$32 per share loss x 4 Billion shares =
$120 +/- Billion Potential/Damage
CREDIT SUISSE'S $35+ BILLION IN FINES/PENALTIESPAYMENTS/ CORPORATE LOSSES/DAMAGES/WRITE-OFFS
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BIG BANK STOCK INDEX
Dow Jones Industrial Average
October 22, 2013
$33.84
CREDIT SUISSE COMMON STOCK PRICE
Jan 2017 Credit Suisse $5.28 billion toxic securities settlement with US DOJ - criminal pleas SDNY - Lack of controls - wire/mail/bank fraud ¶¶298-299
Jan 2019 - Tuna Boat/Bond scandal - Credit Suisse bankers indicted EDNY - $600 million penalty - wire/mail/bank fraud ¶¶19,20(e) 64-68 314-323, 467-469
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Feb-March 2021 Archegos Scandal - $5 billion losses - lack of controls ¶62-63
2020-2022 Tuna Boat/Bond scandal - Credit Suisse and three officials - criminal guilty pleas EDNY - $547 million Credit Suisse penalties - lack of controls - wire/mail/bank fraud ¶¶20(e), 64-68
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March 17, 2023
$2.01
March 2023
UBS Acquisition
$.75 per share
COMMON STOCK PRICE
$70
$60
$50
$40
$30
$20
$10
$0
2013
2014
2015
2016
2017
2018
2019
2020
2021
2022
2023
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In 2022, Credit Suisse's stock fell to single digits. In mid-March 2023 it reported a $8 billion loss for the previous year. ¶ 3. Its new auditor, PwC, admitted that Credit Suisse lacked an "effective risk management process," and its Internal Controls were, and had been, "materially deficient." *Id.* As its stock price continued to fall, Credit Suisse admitted: "The bank could not be saved …. [W]e were no longer able to stem the loss of trust that had accumulated over the years." *Id.*

Credit Suisse never entered insolvency proceedings. On Mar. 19, 2023 the Swiss government caused UBS to acquire Credit Suisse, via a Special Decree. Credit Suisse shareholders, denied their right to vote on the deal, got 1 share of UBS for each 22.48 Credit Suisse shares — about 75 cents in value per share of Credit Suisse. Credit Suisse is a UBS subsidiary.[5] Plaintiffs disposed of their shares.

The NY-based KPMG LLP, KPMG's US operation, is part of the KPMG International network of firms including KPMG A.G., Credit Suisse's external statutory auditor. KPMG's NY/US operation participated in the audits of Credit Suisse, reviewing the effectiveness of Credit Suisse's Internal Controls and adherence to its Conduct Code. Credit Suisse's Internal Controls were deficient. Its Conduct Code was constantly violated. KPMG and its top partners knew this. Nevertheless, for over 20 years, they participated in certifying Credit Suisse's Internal Controls and financial statements, permitting Credit Suisse to continue to operate and prolonging the course of conduct and conspiracy. ¶¶ 5–7, 119–132, 177–178, 398–424, 442–447, 449–481; RCS at 9–10, 15–17, 22–30.

For years, KPMG has been vexed by repeated accounting and financial scandals, a record of misconduct unrivaled by any other firm. It was also the worst performing firm in the PCAOB's annual "surprise" audit inspections, failing 50% of the time![6] ¶¶ 5, 424; RCS at 28–30. To avoid further negative publicity and detection of the course of conduct/conspiracy, KPMG's NY partners

[5] The undisputed facts come from the Prospectus and the Special Decree. Chang Exs. 13–14.

[6] A post-Enron entity, the PCAOB polices accounting firms' compliance with auditing and accounting standards.

corrupted PCAOB employees in NY, promising them lush KPMG jobs to steal PCAOB's confidential list of KPMG audits possibly to be reviewed in future "surprise" inspections. Learning that its Credit Suisse audits were on the "list," KPMG NY partners destroyed and altered audit work papers to conceal the deficiencies in Credit Suisse's Internal Controls, as well as KPMG's deficient audits and improper certifications. When they got caught, KPMG was fined over $50 million and six KPMG and PCAOB officials were convicted in the SDNY of wire and mail fraud in the "Inspection Incident."[7] Destroying and altering the Credit Suisse work papers furthered the course of conduct and conspiracy. Had the deficiencies in Credit Suisse's Internal Control and KPMG's audit been discovered, the course of conduct/conspiracy would have been disrupted. ¶¶ 5–7, 121–133, 411–423, 479; RCS 9–10, 15–17, 22–24, 26–30.[8]

Swiss law required the Credit Suisse Individual Defendants to oversee and supervise the company to assure ***adequate*** "***financial control systems*** … ***as required for the management of the company***" and in particular "***compliance with the law***." CO Art. 716a. Without adequate Internal Controls, Credit Suisse could not be properly managed. The lack of proper management of Credit Suisse and criminal conduct caused the loss/damage to the Credit Suisse shareholders'

[7] KPMG's history of involvement with botched audits continues. KPMG was auditor for Silicon Valley Bank, First Republic Bank and Signature Bank — three recent U.S. bank failures. ¶ 402; *see also* Stephen Foley, *Three Failed Banks Had One Thing in Common: KPMG*, FINANCIAL TIMES, May 2, 2023. It's not just banking. Julia Horowitz, *Audits of Chinese Companies by KPMG Full of Holes, U.S. Watch Dog Finds*, CNN BUSINESS, May 10, 2023. In addition to the long list of KPMG scandals at ¶ 424, while this briefing was unfolding, another scandal broke involving the collapse of a major UK government contractor, Carillion plc.: Jon Holt, KPMG UK's chief executive admitted that "our audit work on Carillion was very bad, over an extended period." Huw Jones, *KPMG Hit with Record Fine for 'Textbook Failure' in Carillion Audits*, REUTERS, Oct. 12, 2023 ("[f]ailures included not challenging Carillion management, and loss of objectivity"); Julia Kollewe & Kalyeena Makortoff, *KPMG Boss Says Carillion Auditing Was 'Very Bad' as Firm Is Fined Record £21m*, GUARDIAN, Oct. 12, 2023.

[8] KPMG is the most dishonest of big accounting firms. It pursues a business strategy of accommodating its clients' dishonest conduct, viewing the resulting fines and payments as a "cost of doing business" justified by the $35 billion in global revenues and the sizable profit per partner generated by this strategy. *See* ¶¶ 399, 404, 410, 423–424, 442.

property, *i.e.*, their shares. The deficiencies were never fixed. The Credit Suisse Enterprise emerged. Multiple convictions followed. Defendants engaged in a course of conduct and conspiracy, resulting in RICO predicate acts and damaging the shareholders. ¶¶ 449–480; RCS at 11–30.

Defendants' Motions to Dismiss should be denied because:

- The Swiss law and RICO claims are expressly and adequately pleaded as direct claims by individual shareholders seeking individual damages via a Rule 23 class action. They are not derivative claims. However, if the claims asserted or the damages recovered are viewed as "derivative," the Court should "mold" the recovery via a "pro rata shareholder distribution" to protect innocent victims and prevent a windfall to UBS, corporate successor to wrongdoer Credit Suisse, where many Credit Suisse wrongdoers went to work and had their Credit Suisse stock options converted into UBS stock plans.

- Defendants failed to carry their burden of proof on their *FNC* motion; personal jurisdiction has been adequately pleaded due to Defendants' presence in NY/US.

- The Swiss law affirmative defense of "discharge" and purported "share registration" requirement to sue only apply to derivative suits — not to these direct class action claims for individual shareholders. Such defenses are factual and premature in any event.

- The affirmative defense of limitations is fact-based, premature and cannot bar all claims due to the 2019–2023 wrongdoing and allegations of a continuing course of conduct/conspiracy, with years of false assurances raising tolling issues.

BACKGROUND

I. Parties

A. Plaintiffs

Plaintiffs are U.S. citizens domiciled in Indiana and NY.[9] Each owned shares of Credit Suisse common stock after Oct. 22, 2013,[10] and suffered losses and/or damage to their property (Credit

[9] Every federal district is a home forum to all U.S. citizens, whether the forum is in "the district in which [they] reside[]." *Iragorri v. United Techs. Corp.*, 274 F.3d 65, 73 (2d Cir. 2001) (*en banc*).

[10] Credit Suisse's ADSs are the same as its common stock. Credit Suisse's common stock was traded on the NYSE in the form of ADSs and on foreign exchanges in the form of ordinary shares. Thousands of Credit Suisse shareholders in NY/US owned 540-plus million common shares in the form of ADSs. The ADSs were counted as common shares by Credit Suisse and were so treated in the UBS merger. According to Credit Suisse, each ADS "represents an ordinary share of the Company." Convertible into ordinary shares via BNY Mellon in NYC at a 1-to-1 ratio, the ADSs are the legal equivalent of Credit Suisse's ordinary shares. ¶¶ 8, 160; *see also* Perucchi ¶¶ 53–54.

Suisse shares) caused by Defendants' misconduct. ¶¶ 2, 5, 8–11, 79; RCS at 1, 30.

B. Credit Suisse Defendants

CSGAG, organized under Swiss law, opened its NY operation in 1870. It does billions of dollars of business in US/NY. Its "Americas" headquarters are in a 30-story skyscraper at 11 Madison Avenue, with 10,000 employees.[11] ¶ 80. CSGAG uses the Credit Suisse Entity Defendants to manage/operate its US/American Business. Each is a Delaware corporation, with its principal place of business in NY. ¶ 83. Each is a "person" under Swiss law, subject to the liability provisions of CO Arts. 754, 755 and 759, as well as Arts. 41, 50 and 55. Because they employed one or more of the Credit Suisse Individual Defendants, they face joint and several liability under CO Arts. 50 and 759. Perucchi ¶¶ 13–19, 21–25, 26–45.

The Director Defendants' positions, involvement and jurisdictional contacts with US/NY are pleaded at ¶¶ 85–97; the Officer Defendants at ¶¶ 98–116. They are obligated under Swiss law and Credit Suisse's governance structure to ***collectively*** oversee its business, using the Audit/Financial and Conduct/Crime and Risk Control Committees. ¶¶ 82–83, 203–225. They face joint and several liability for violating those obligations. ¶¶ 82, 87–97, 166–167, 223–226; CO Arts. 50, 759. This structure was to enable them to manage the CSGAG, as "***one economic unit***" with "***integrated*** oversight" of its "***integrated*** business model," "***including the*** [***NY***] ***subsidiaries***," in order to "maintain an exemplary control and compliance culture." ¶¶ 82, 166, 167, 211–226.

[11] There are over 300 other separate Credit Suisse controlled entities located here in NYC. About 100 Credit Suisse entities are incorporated in Delaware and have their principal place of business in NY. Credit Suisse and its subsidiaries are parties to contracts and undertakings that consent to US/NY jurisdiction and the application of US/NY laws. ¶¶ 80–81.

Credit Suisse Defendants	Offices – Years – Duties/Positions
Doyle	**Credit Suisse Group AG:** Director 2004–2017 Vice Chair 2014–2017 Chairman's Committee 2014–2017 Risk Committee 2004–2017 Audit Committee 2007–2016
Thornburgh	**Credit Suisse Group AG:** Director 2006–2018 Vice Chair 2014–2018 Audit Committee 2011–2018 Risk Committee 2006–2018 Governance Committee 2009–2018 Executive Board / CFO 1997–2005 Investment Bank **Credit Suisse NY Subsidiaries:** Board Chair 2015–2018
Ribeiro	**Credit Suisse Group AG:** Director 2016–2021 Audit Committee 2016–2021
Rohner	**Credit Suisse Group AG:** Board Chair 2011–2021 Vice Chair 2009–2011 Chair Financial Crime Control Committee– 2009–2011 Executive Board 2004–2009 Chief Operating Officer 2006–2009 General Counsel 2004–2009
Tiner	**Credit Suisse Group AG:** Director 2009–2021 Chair Audit Committee/Chair Financial Crime Control Committee 2009–2021 **Credit Suisse Holdings, Credit Suisse Securities USA-** Director 2015–2021
Bohnet	**Credit Suisse Group AG:** Director 2012–current
Nargolwala	**Credit Suisse Group AG:** Director 2013–2022 Chair/CEO Asian/Pacific Region 2008–2010 Financial Crime Control Committee 2013–2022 Compensation Committee/Risk Committee 2013–2017
Vasan	**Credit Suisse Group AG:** Executive Board 2003–2016 CEO Private Bank/Wealth Management 2013–2016 Global Head – Prime Services 2003–2013 Global Head – Foreign Exchange 1997–2000
Dougan	**Credit Suisse Group AG:** CEO 2007–2015 Executive Board 2003–2015 CEO Investment Banking 2006–2007 CEO Equities 1996–2001 CEO Securities 2001–???
Brady	**Credit Suisse Group AG:** Executive Board 1994–2016 Dougan's "right hand man"
Varvel	**Credit Suisse Group AG:** Executive Board 1990–2021 Director Wealth Management/Asset Management CEO Investment Banking 2010–2012 Credit Suisse Holdings USA – CEO

Credit Suisse Defendants	Offices – Years – Duties/Positions
Mathers	**Credit Suisse Group AG:** Executive Board Chief Financial Officer –2010–2022 CEO Investment Banking 2007–2010 CEO Credit Suisse International 2016–2022
Hudson	**Credit Suisse Group AG:** Executive Board Chief of Compliance/Regulatory Affairs 2008–2021
Shafir	**Credit Suisse Group AG:** Executive Board 2007–2015 CEO Americas 2007–2012 CEO Asset Management 2008–2012 Joint CEO Wealth Management 2012–2015
Klein	**Credit Suisse Group AG:** Director 2018–2022 Risk Committee 2018–2022
Macia	**Credit Suisse Group AG:** Director 2015–current Risk Committee 2018–current Audit Committee 2015–2018
Bianchi	**Credit Suisse Group AG:** Director 2022–current Audit Committee– 2022–current Risk, Conduct and Finance Crime Control Committee–2022–current
Warner	**Credit Suisse Group AG:** Executive Board 2015–current Chief Risk Officer 2015–2021 Chief Compliance/Regulatory Affairs 2015–2019 Chief Operating Officer Investment Banking 2013–2015
Thomas-Graham	**Credit Suisse Group AG:** Executive Board 2015–2022 Head of Wealth Management 2013–2015
Jain	**Credit Suisse Group AG:** Executive Board 1996–2016 Global Head Wealth Management Co-head Global Securities/Propriety Trading
Popp	**Credit Suisse Group AG:** Executive Board 1997–2022 Wealth Management NY CEO/CIO Investment Group CEO Credit Suisse Funds
Chin	**Credit Suisse Group AG:** CEO Global Markets Investment Banking 2003–current Senior Executive Investment Banking 2003–2012 Credit Suisse Holdings/Credit Suisse (USA)/Credit Suisse Securities – Executive positions - 2016–present
Kim	**Credit Suisse Group AG:** Managing Director Global Head Securitized Products 2011–2023

Even with all the details pleaded — 275+ pages of names, dates, places, guilty pleas and more — Defendants deny what is alleged. Yet they demand more — a never-ending escalation of specificity demands. The claims of lack of specificity by the Credit Suisse Individual Defendants have no merit. Details are pleaded here:

- Each Director (¶¶ 87–97) and Executive (¶¶ 98–116) is identified with detailed personal histories and positions with Credit Suisse.

- The Audit, Risk and Conduct Control Board Committees they served on and the duties of these Committees are at ¶¶ 85, 222–223, 378; *see also* RCS at 11–15.

- Their collective misconduct is at ¶¶ 340–344. Their collective acts of negligent mismanagement, including continuing to retain KPMG, are at ¶¶ 347–349. The specific violations of their obligations and the warnings they turned aside are at ¶¶ 352–353.

- How Popp, Jain, Chin, Shafir, Kim and Sohn shared in secret, illicit bonuses and "skimming" of "cherry picked" deals for themselves are at ¶ 377. Conduct of Cerutti, Warner, Mathers, and Hudson is at ¶ 372.

- How Dougan ran CSGAG as worldwide CEO from the NY office, working with Rohner, Tiner and Nargolwala is at ¶¶ 108, 246, 284–285, 298, 343, 362–376, 385.

- How Rohner, Tiner, and other Directors paid "hush money" to Shafir, Brady, Jain, Vasal and Dougan is at ¶¶ 360–382.

Being a Credit Suisse Director/Executive was a ticket to the international elite and wealth. They took over $100 million per year in pay, bonuses and stock grants, which were obtained via false pretenses in acts of financial institution "bank" fraud and bad-faith conduct, which constituted mismanagement (a misuse) of corporate assets. ¶¶ 11–12, 357–385; RCS at 31–32; 18 U.S.C. § 1344.

> Senior staff at Credit Suisse received additional bonuses worth hundreds of millions of dollars over many years, most of which were not officially recorded… Credit Suisse paid out $32 billion in bonuses since 2013 during a timespan when the bank suffered losses of $3.2 billion. [¶¶ 12, 377.]

Board Chair/Vice Chair are fulltime jobs. Between 2013 and 2022 Rohner and Tiner got $50+ and $20+ million. Directors got $250,000–$300,000 per year, plus $600,000 to sit on the Audit, Crime Control and Risk Committees; $150,000–$250,000 more to sit on the boards of the NY subsidiaries. All Directors were annually given large stock grants with the ability to convert them to cash from Credit Suisse rather than sell them on the open market, which they did. ¶¶ 473–478; RCS at 31–32. They thus obtained bank assets/securities under the false pretense that they were performing their duties in accordance with law and the Conduct Code. ¶¶ 438(f), 449, 473–478; RCS 31–32.

These Defendants also mismanaged Credit Suisse's assets, using them to pay headline-grabbing fines while arranging pleas by subordinates or subsidiaries, to allow themselves to avoid

personal accountability. They did this to preserve their positions of power, prestige and profit so the course of conduct/conspiracy could continue. ¶¶ 11, 29, 35, 86, 361; RCS at 1–15.

C. KPMG Defendants

KPMG was formed in NY in 1890. KPMG LLP is a Delaware entity. KPMG LLP is the US operation of KPMG's "global network" with 145 offices, 265,000 employees and $35 billion in annual revenues. ¶ 119.[12] KPMG LLP's principal place of business is in NY. *Id.* It is a NY citizen. *Id.* It has 5,000 professional employees in three NY offices, 75 US offices with 40,000 employees. *Id.* KPMG LLP, as part of the KPMG international network, was engaged in the annual audits of Credit Suisse for decades, working with KPMG AG, Credit Suisse's statutory auditor, in certifying the adequacy of Credit Suisse's Internal Controls and accuracy of its financial statements. ¶¶ 119–123, 125; RCS at 1–10, 15–16, 25–30.

Credit Suisse was an important client to KPMG. ¶ 122. Credit Suisse was one of the largest clients in KPMG's NY office, generating tens of millions of dollars in yearly fees. ¶ 20(f). KPMG was not independent of Credit Suisse. ¶ 122. Given Credit Suisse's massive NY operation, KPMG LLP and the top audit partners in its three NY offices were constantly engaged in the ongoing Credit Suisse annual audits, evaluating its Internal Controls and risk management procedures, doing consulting work to such an extent that KPMG actually became involved in managing Credit Suisse. *See id.* KPMG personnel were constantly inside Credit Suisse's operations in NY and elsewhere, actually involved in the management of its business, while working on Internal Controls, IT systems and risk management procedures, as well as the effectiveness of the Conduct Code, such that KPMG later ended up auditing its own work while auditing Credit Suisse. *Id.* KPMG knew Credit Suisse's Internal Controls were deficient, and that the Conduct Code was being violated. ¶¶ 7, 411. The

[12] KPMG International is also headquartered in NY, where the CEO of KPMG International (Thomas) lived, and where he managed the worldwide firm. ¶ 124(a).

deficiencies were never fixed and the violations never stopped. ¶¶ 5–7, 11, 20, 31, 46–48, 221, 404, 411–423, 442. They performed their work here in NY, as part of the worldwide Credit Suisse engagement of KPMG AG as statutory auditor. ¶¶ 5–6, 20, 31, 46–48, 124–133.

The external auditor has express duties under Swiss law (CO Art. 728):

- The external auditor must be independent and form its audit opinion objectively. Its true or ***apparent independence*** must not be adversely affected.

- The following are in particular not compatible with independence:

- ***Any*** … decision making function in the company ….

***

- The involvement in the accounting or the provision of any other service which give rise to a ***risk that the external auditor will have to review its own work***.

- The assumption of a duty that leads to ***economic dependence***.

- The provisions on independence apply to ***all persons involved in the audit***. If the external auditor is a partnership or a legal entity, then the provisions on independence also apply to the members of the supreme management or administrative body and to other persons with a decision-making function.

***

- The external auditors' duties include examination to determine:

- ***There is an internal system of control***.

- The external auditor takes account of the internal system of control when carrying out the audit and in determining the extent of the audit. CO Art. 728(a).

The external auditor also has to ***inform the shareholders*** of illegal conduct or failure to follow corporate conduct codes:

> "If the external auditor finds that there have been infringements of the law, … it shall give notice of this to the board of directors in writing," and to the shareholders if the board of directors fails to take any appropriate measures on the basis of written notice given by the external auditor.

The external auditor is not allowed to destroy audit work papers.

- The external auditor must document all audit services and keep audit reports and any other essential documents for at least ten years.

The Complaint details KPMG's violations of these provisions by participating in misconduct,

and furthering the ongoing course of conduct and conspiracy. Every year — for 15+ years — KPMG auditors falsely certified that Credit Suisse's Internal Controls were effective and its financial statements were accurate. ¶¶ 5–7, 404, 410–423, 442–443, 445, 479–481. KPMG then topped that off with the "Inspection Incident," *i.e.*, the "Steal the List" crimes resulting in a $50 million fine and six criminal convictions. RCS at 1–10, 15–16, 23, 26–28, 30–33.

Two groups of KPMG actors are involved here. Five KPMG auditors and six "Steal the List" criminal actors. ¶¶ 123–133. The KPMG auditors were all longtime KPMG LLP NY officials/partners, *i.e.*, Knopp, Newinski, Bradley, Veihmeyer and Thomas (who was also the CEO of the KPMG International network operating out of NY). ¶¶ 123–125. All the KPMG auditors and the Steal the List actors each knew that the criminal scheme was being pursued to help prevent detection and the public disclosure of Credit Suisse's Internal Control deficiencies and permitted or participated in that theft, and the altering of work papers. ¶ 125.

KPMG LLP, Knopp, Newinski, Thomas, Bradley and Veihmeyer all assert, without citation, that "there are no allegations that any of them performed audits or other services for Credit Suisse," that they had "no connection whatsoever to Credit Suisse," and that Plaintiffs "fail[] to name a single KPMG US partner or official who was 'involved' in any [CSGAG] audit," "much less facts suggesting *anyone* official with KPMG US did *anything* to support any audit of [CSGAG].'" KPMG LLP' Br. at 2, 7; KPMG Int'l Defs.' Br. at 1–2. Yet ¶¶ 124–126 and 146 allege the opposite. Thomas was "Chair of KPMG Americas region from 2014-2017 before becoming CEO of KPMG International (¶124(a)), Veihmeyer "served as Chairman and Chief Executive Officer of KPMG's US operations from 2010–2017, including being US Chairman" (¶ 124(e)). Bradley was the head of Global Audit for KPMG (¶ 124(d)). They both worked on the Credit Suisse engagement in the NY office for years; they both knew that Credit Suisse's Internal Controls were materially deficient, that its Conduct Code was being violated and that, despite the "Steal the List" scandal and other ongoing RICO predicate acts, KPMG

repeatedly certified the effectiveness of Credit Suisse's Internal Controls and accuracy of its financial statements. ¶¶ 5–7, 11, 20(b), 31, 46–48, 119–133, 177–178, 221, 347, 351, 398–423.

Knopp, Newinski, Bradley, Veihmeyer and Thomas each:

- Lived in NY and/or worked out of KPMG's NY headquarters (¶ 125);
- Had "substantial contacts" with the US and SDNY, and "engaged in conduct that had a direct, reasonably foreseeable and intended effect causing injury to persons" in the US and the SDNY (¶ 146);
- Were employed by KPMG LLP or other KPMG entities responsible for and engaged in the Credit Suisse audits (¶ 125);
- Worked on the Credit Suisse engagement, in auditing or supervising the annual audits, consulting with Credit Suisse and participating in the management of Credit Suisse (*Id.*);
- Knew Credit Suisse's Internal Controls were materially deficient and its Conduct Code was not being enforced (¶ 125); and
- Knew of the illicit "Steal the List" activities and the destruction and alteration of the Credit Suisse work papers to cover up deficiencies in the Credit Suisse audits and defects in Credit Suisse's Internal Controls and were committed to allow the course of conduct/conspiracy to continue (¶¶ 125–126).

In addition to the KPMG Audit Partners are the six "Steal the List" actors, *i.e.*, who actually stole the list, and altered or destroyed KPMG's Credit Suisse work papers, committing KPMG's own predicate criminal acts, furthering the course of conduct/conspiracy. The "Steal the List" actors include three KPMG LLP New York partners, Marcello, Middendorf and Whittle, and three NY PCAOB employees, Sweet, Holder and Wada. ¶¶ 126–133. They were all convicted in the SDNY of mail and wire fraud. Who did what is laid out at ¶¶ 413-423, 442–445, 479–481.

II. Statutory Bases for the Claims

The substantive claims are based on Swiss Law, CO §§ 41, 42, 50, 55, 716a–b, 717, 754, 755 and 759; and the U.S. RICO statute, 18 U.S.C. §§ 1962–1964.[13]

[13] Select provisions of RICO, the CO and CPC are reprinted in Addendums A through C.

A. Swiss Statutes

The CO — Switzerland's corporation code — imposes specific duties of oversight and management on the Directors/Executives and also on "all persons" or "third parties engaged in the management" of the corporation and to perform those duties with "all due diligence in good faith." CO Arts. 754–755. These liability statutes are not limited to Directors/Executives or the external statutory auditor firm — but reach "***all persons***" and "***third parties***," "***engaged***" in the management of the corporation or its annual audits. The CO also provides express remedies for "the individual shareholders" to recover losses or damages from such persons. Perucchi ¶¶ 3–14, 22–26, 29, 31–34.

> **Art. 716a** The board of directors has the following non-transferable and inalienable duties:
>
> (1) The overall management of the company …
>
> ***
>
> (2) The organization of the accounting, financial control and financial planning systems as required for management of the company;
>
> (3) Overall supervision of the persons entrusted with managing the company, in particular with regard to compliance with the law, … operational regulations and directives;

> **Art. 717** The members of the board of directors ***and third parties engaged***[14] ***in managing the company's business*** must perform their duties with all due diligence.

> **Art. 754** The members of the board of directors and ***all persons engaged in the management … of the company are liable both to the company and to the individual shareholders for any losses or damage arising from*** [***a***] … ***negligent violation of their duties***.

> **Art. 755** ***All persons engaged*** in auditing the annual and consolidated accounts … are liable…. Both to the Company ***and to the individual shareholders for the losses arising from any negligent breach of their duties***.

> **Art. 756** In addition to the company, the Individual shareholders are also entitled to sue for any losses caused to the company. …

[14] Engaged in means "involved in." BLACK'S LAW DICTIONARY, at 528 (6th ed. 1990) (defining "engage" as "[t]o employ or involve one's self"); *Sw. Airlines Co. v. Saxon*, 142 S. Ct. 1783, 1789 (2022) ("to be 'engaged' in something means to be 'occupied,' 'employed,' or 'involved' in it").

> **Art. 759** If several persons are liable for a damage, any one of them is jointly and severally liable with the others ….

CO Arts. 41, 50, and 55 provide "any person who unlawfully causes damage to another, whether willfully or negligently, is obliged to provide compensation"; where two or more persons have together caused damage, whether as instigator, perpetrator, or accomplice, they are ***jointly and severally liable***. Finally, "an employer" (like the four Credit Suisse NY subsidiaries) is "liable" for the "damage caused by his employees," unless the employer proves that it took all due care to avoid the damage or that the damage would have occurred even if all due care had been taken.[15] These corporate entities are "persons" under Swiss law, and thus subject to the duties and liabilities of the CO. Perucchi ¶¶ 35–39, 59–62. Very different from the corporation codes in the US, these exceptionally broad statutes provide specific duties to shareholders, and impose express liabilities for "losses or damage" on corporate Directors/Executives and all others engaged in managing this corporate business or auditing it arising from their negligence. Perucchi ¶¶ 46–48.

In light of the legal obligations of care imposed by Swiss law and broad joint and several liability for negligence, as instigator, perpetrator or accomplice, the detailed allegations of the positions of the Directors/Executives, those of the KPMG Defendants, and their individual involvement in the course of conduct/conspiracy, the demands for greater detail as to their participation in the wrongdoing should be rejected.

[15] These entities are "persons" under Swiss law. Perucchi ¶¶ 35–39, 59–62. They managed and conducted Credit Suisse's operations in the US/Americas, employing several of the Credit Suisse Individual Defendants, several of whom were also members of the boards of directors of these subsidiaries, while others were employed by them. ¶¶ 83–84.

B. Federal Statute — RICO

The RICO statute, 18 U.S.C. §§ 1962–1964, provides any person[16] who participates in an enterprise through multiple "predicate" acts of mail, wire, financial institution, visa fraud and money laundering within 10 years, *i.e.*, a pattern of racketeering activity, is liable to persons damaged in their property, for treble damages. 18 U.S.C. § 1964(c).

III. Credit Suisse's "Brazen/Systematic and Pervasive" Misconduct — the "Stunning Scale" of Illegal Activities and a Cesspool of Criminality

A. Admissions of Mismanagement

Credit Suisse Chair Lehmann admitted (¶15):

> "It has become clear that the challenges of the past were not solely attributable to isolated poor decisions or to individual decision makers." … "Within the organization as a whole, we have failed too often to anticipate material risks in good time in order to counter them proactively and to prevent them …," [including] a $5.5bn trading loss the bank suffered on the collapse of family office Archegos Capital last spring, the biggest in its history. … [J]ust weeks after Credit Suisse was forced to close a group of funds linked to … Greensill Capital, …. [t]he twin crises have been the most prominent in a string of scandals that have plagued the bank going back to the global financial crisis of 2008.
>
> A common thread running through the bank's failings has been a risk department that was all too often overruled by commercially minded executives who were chasing higher returns from riskier deals …. [An extensive investigative report by N.Y-based Paul Weiss] described in excoriating detail a catalogue of individual and organizational errors [which] said the losses were the result of a "fundamental failure of management and controls" … and a "lackadaisical attitude towards risk."
>
> ***
>
> Crisis: Fraud, Scandals and Fallouts
>
> While other banks were forced to clean up their act in the years following the crash, Credit Suisse put off dealing with legacy problems and was more willing to take risks. Its final years as an independent business have been marked by a series of scandals and heavy losses, as it lurched from one crisis to the next.[17]
>
> ***
>
> Credit Suisse has been involved in multiple scandals that have rattled investors in recent years, including the mismanagement of funds... The bank closed the 2022 fiscal year with a loss of nearly $8 billion. The bank was convicted in June 2022 of failing to prevent money laundering by a … cocaine trafficking gang … [which] washed

[16] "[P]erson" under RICO includes corporate entities. 18 U.S.C. § 1961(3).

[17] *Owen Walker & Stephen Morris, Credit Suisse: The Rise and Fall of the Bank That Built Modern Switzerland,* FINANCIAL TIMES, Mar. 24, 2023. ¶ 15.

> millions of dollars through the bank …. In March 2022, a … court ruled the bank owed former Georgian Prime Minister Bidzina Ivanishvili and his family around $500 million in damages from Credit Suisse[]. [Because] Pascale Lescaudron, committed a long-running fraud … the case will cost around $600 million.[18]
>
> Credit Suisse and KPMG have been operating a criminal enterprise.
>
> Over the last few decades, Credit Suisse has earned itself a rather dubious reputation due to its various banking deals that helped dictators, criminal gangs, embargoed states, and others.
>
> Regulators have also pulled it up for tax evasion, frauds carried out against its own customers, money-laundering, kickbacks, and several other offences.
>
> In February 2022, a massive leak (details of more than 30,000 bank customers and their more than 18,000 accounts) revealed that Credit Suisse harbored the hidden wealth of clients involved in torture, drug trafficking, money laundering, corruption and other serious crimes. The revelations point to apparently widespread failures of due diligence by the lender, despite repeated pledges to weed out dubious clients and stamp out illicit funds.[19]
>
> *The Wall Street Journal* put this sordid history in perspective:
>
> Stretching back to Nazi gold, Credit Suisse had harbored money for suspect clients. In a 2014 settlement with the U.S. Justice Department, the bank paid $2.6 billion and admitted its bankers had hand delivered cash and destroyed documents to help Americans hide untaxed wealth.[20]

B. Credit Suisse's Historic out-of-Control and Criminal Operations

In 2000, Credit Suisse acquired DLJ for $11 billion, forming its modern massive NY operation. ¶ 24. CSGAG's CEO Dougan ran the its operation from NY for years, while it became infested with criminal conduct and part of a Credit Suisse criminal enterprise. ¶¶ 108, 116, 362.

Suffering from the Directors/Executives' "systematic supervisory failures producing" a

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[18] Arianna Johnson, *What's Happening with Credit Suisse, Explained; Embattled Bank Rattles Stock Market as Banking Crisis Deepens*; FORBES, Mar. 16, 2023. ¶16.

[19] *The Collapse of Credit Suisse and Attempts by Swiss Government to Salvage Bank with Long and Dubious History*, BUSINESS BRIEFS, Mar. 19, 2023.

[20] Margot Patrick, *et al.*, *It Wasn't Just Credit Suisse. Switzerland Itself Needed Rescuing*, THE WALL STREET JOURNAL, Mar. 22, 2023.

Reports show Credit Suisse never stopped these illicit/illegal practices — continuing to assist Nazi-related entities, hiding assets and U.S. taxpayers' tax evasion until recent times. ¶ 18. *Credit Suisse hid Nazi-linked accounts as recently as 2020*, JEWISH NEWS SYNDICATE, Aug. 21 2023.

"corrupt culture," Credit Suisse became embroiled in suits and prosecutions in NY/US, which resulted in: (a) $15+ billion in fines/penalties by the NYAG, the NYDFS, the DOJ, the SEC and other regulators, and $15+ billion in DLJ related losses and write-offs; and (b) repeated criminal convictions for mail, wire and bank fraud, visa/immigration fraud and money laundering, and findings of deficient Internal Controls. ¶¶ 19–20, 56–78, 438, 442–446, 449–474; RCS at 11–15, 17–19, 22–27.

1. Toxic Securities, Illegal Dark Pools and Rigged FOREX Trading

In 2008, Credit Suisse's NY operation lost $3 billion in "toxic" subprime securities, due to a lack of Internal Controls and inadequate supervision by the Directors/Executives. Several Credit Suisse Executives suffered SDNY criminal convictions. ¶¶ 19-20, 24-25, 30, 50, 244-264.

Credit Suisse's NY operation lacked "adequate systems and controls." It suffered from a "lack of monitoring … systems and controls." The Directors/Executives failed to "adequately supervise" this operation — "serious supervisory failures." They "failed to conduct business with due skill, care and diligence … failing to control [that] business effectively," with "serious failures in the controls over the operation." ¶¶ 48, 50, 52, 63, 256.

Credit Suisse insiders called these securities "crap," "sludge" and "utter and complete garbage," while selling billions of "dogshit" to its clients, making what the NYAG said were "false and irresponsible representations." ¶¶ 20(c), 51–55. This "irresponsible behavior" was a "huge breach of trust violating [NY] law and abusing customers for many years." When Credit Suisse's inventory backed up, managers told salespeople: "we have almost $2.5B of conduit garbage to still distribute." ¶¶ 19(b), 20, 54, 73-74, 298, 457.

Credit Suisse permitted a "corrupt culture" and "unlawful, unsafe and unsound conduct." They "failed to implement controls", committed "systematic supervisory failures" including failure to enforce the Conduct Code. According to the SEC, the "stunning scale" of the toxic securities misconduct was "exceeded only by the greed of senior bankers involved." ¶¶ 49, 258.

Credit Suisse paid $7+ billion to regulators and others between 2017 and 2020 as a result of this fiasco. Credit Suisse "consistently engaged in unlawful, unsafe and unsound conduct by failing to implement effective controls" due to "a corrupt culture." ¶ 20(d). It "violated NY law and repeatedly abuse[d] the trust of their customers over … many years." ¶ 52. There were "multiple breaches" despite "repeated reminders." *Id.* Credit Suisse continued to suffer from a "supervisory and compliance monitoring system [that] was seriously flawed" and "resulted in a systemic supervisory failure," *i.e.*, "the bank tolerated acts and practices that it knew were contrary to its own guidelines." ¶¶ 20, 52, 246, 253, 279. The NY misconduct went beyond toxic securities. For abusing "dark pools," and manipulating FOREX trading, Credit Suisse was fined $300 million. ¶¶ 19(d), 26, 49, 52, 258.

2. Tax Evasion Assistance and Money Laundering

Credit Suisse's NY/US Wealth Management operation was also a cesspool of illegality. Credit Suisse's Directors permitted illegal tax evasion assistance to NY/US residents, a core "business model," going back to 1953. ¶¶ 26–46, 228–243, 265–279, 301–307, 311–312. "Ignoring numerous red flags," the Directors "knowingly and willingly" spearheaded a "brazen," massive multi-billion-dollar tax-evasion scheme in NY, the "hub for the Bank's private banking business that played a significant role in the Bank's facilitation of tax evasion." ¶¶ 35–36, 41, 265, 275, 278, 343.

The tax evasion involved Credit Suisse foreign nationals' illegal visits into US/NY to meet with tax-cheaters — in violation of U.S. visa/immigration laws. ¶ 258. It engaged in "intentional misconduct," a wide-ranging conspiracy in "systematic" tax-evasion activities. ¶¶ 36, 38, 41, 234, 238, 273, 274. This "systematic" misbehavior was by "hundreds of bank employees including managers … over decades." ¶ 400. Credit Suisse was a "willful accomplice" in "systematic" tax evasion with thousands of accounts worth billions — secret US trips by Credit Suisse brokers/advisors, secret transfers of account statements and cash — "cloak and dagger tactics." ¶¶ 37, 267–268.

For this, Credit Suisse was initially fined $200 million, and eight Credit Suisse bankers took

guilty pleas. ¶¶ 238–243. In 2014, CSGAG itself pleaded guilty, paid a $2.6 billion fine and admitted it "operated an illegal cross-border banking business that knowingly and willfully aided" tax evasion in the U.S. The guilty plea/enhanced penalties were because the Directors/Executives, to protect themselves from personal exposure, obstructed the criminal investigation, allowing "documents to be destroyed," while conducting a "shamefully inadequate internal inquiry" to cover up their own involvement. ¶¶ 19, 20, 40–41, 267, 271–273.[21]

Prosecutors found aiding tax evasion was a "business model that Credit Suisse engaged in for decades," "violat[ing] governance and business conduct requirements," and "its duty to identify, limit and monitor the risks involved in its U.S. business, exposing the entire financial group to unduly high legal and reputational risks"; this "violated business conduct requirements" under the Swiss supervisory law. ¶¶ 275–276.[22]

Tax evasion requires money-laundering. FINRA penalized Credit Suisse for "significant deficiencies in anti-money laundering programs" — "ignoring red flag[s]". Others fined Credit Suisse for "breaches of anti-money laundering requirements and lapses in controls." It was sanctioned for "failures in anti-money laundering procedures" due to "weaknesses" that "occurred repeatedly over a number of years." During 2020–2021, Credit Suisse was again indicted for money laundering on a "grand scale," and again sanctioned by the U.S. Fed and the NYDFS for major deficiencies in money laundering controls. ¶¶ 16–17, 20(e), 43, 45, 71–73.

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[21] After the U.S. crackdown, European nations conducted "a criminal investigation into undeclared black accounts" and "aggravated money laundering and financial fraud" — "a sweeping tax evasion and money laundering investigation spanning five countries … and thousands of account holders," which "if proven indicate the bank was effectively a global criminal enterprise." ¶¶ 20(b), 45, 307. Over time, Credit Suisse was fined $540 million by Italy, Germany, and France for "illegal money laundering." ¶ 45.

[22] Despite the 2014 criminal plea and promises to stop tax-evasion assistance, a 2023 U.S. Senate Report, "Credit Suisse's Role in U.S. Tax Evasion Schemes," exposed how it continued to illegally help U.S. citizens hide assets and evade taxes, violating the 2014 plea agreement. ¶¶ 44, 78.

C. Defendants' Continuing Mismanagement, Course of Conduct and Civil Conspiracy Resulted in Repeated Scandals

1. Archegos Scandal

In March 2021, Credit Suisse suffered "highly significant and material" losses due to loans to Archegos, a NY hedge fund controlled by one Hwang, who had a criminal history and a prior $44 million penalty. ¶¶ 62, 353. Due to a lack of Internal Controls, Credit Suisse extended billions in margin loans to Archegos, which collapsed. ¶ 63. Credit Suisse SEC Form 20-F, Mar. 14, 2023, at 41, 50–51. Credit Suisse incurred a charge of CHF 4.8 billion in the Archegos scandal (¶ 63):

> On July 29, 2021, we published the report based on the independent external investigation into Archegos, which found, among other things, a failure to effectively manage risk in the Investment Bank's prime services business by both the first and second lines of defense as well as a lack of risk escalation.
>
> We have identified material weaknesses in our internal control over financial reporting as of December 31, 2022 and 2021.

2. Greensill Scandal

In March 2021, the Greensill scandal engulfed Credit Suisse, costing it over $3 billion. ¶¶ 57–61. "[T]he crisis renews questions about risk management and controls" (¶¶ 60–61):

> Senior Credit Suisse executives overruled risk managers to approve a $160m loan to Greensill Capital, which the collapsing finance group now has "no conceivable way" to repay. … [T]he loan … was initially rejected by … risk managers in the investment bank …, was "hugely controversial" and was "imposed from above" by the "top brass" … without sufficient internal discussion or due diligence.

3. Tuna Boats/Bonds Scandal

The 2019 Tuna Boats/Bonds scandal involved an "odious," "grotesque", "brazen criminal scheme" involving "bribery, money laundering," that again resulted in criminal convictions of CSGAG itself and three of its investment banking officials in the EDNY, costing $547 million. ¶¶ 20(e), 64–68. Credit Suisse officials put together a $850 million loan to fund a tuna fishing industry for an African country. Working in cahoots with corrupt officials, they siphoned off hundreds of millions of the loan proceeds. The project failed. Tuna Bonds, sold to investors in NY/US, defaulted. ¶¶ 64–68, 170(e), 314–323, 340, 467–472.

Credit Suisse Ignored Warning on $2 Billion Deal with Tycoon

> Credit Suisse Group AG ignored warnings from its … regional chief executive officer on the risks … in a scandal that has … opened up questions about its due diligence. The bank had previously designated the [borrower] as "an undesirable client …." An attempt to open an account in which he was the beneficial owner had also been previously rejected … the banks internal records described Safa as a "master of kickbacks."

4. Princelings "Pay off" Scandal

In 2018, Credit Suisse paid fines of $80 million in the EDNY for a "scheme to corruptly win banking business by awarding employment to friends and family of Chinese officials." ¶¶ 51, 169, 308, 466. This involved wire/mail fraud and resulted in a "criminal penalty [that] provides explicit insight into the level of corruption that took place at Credit Suisse." ¶¶ 51–69, 388, 466.

5. York Capital Hedge Fund Scandal

In late 2020, Credit Suisse wrote off its entire investment in York Capital. ¶ 70. York Capital was a NYC-based Hedge Fund, into which Credit Suisse invested $425 million. The Credit Suisse Defendants acted negligently, without due diligence. *Id.*

6. Lescaudron/Ivanishvili Scandal

This "brazen" criminal violation will end up costing Credit Suisse over a billion dollars. ¶¶ 16, 75–76. In February 2021, Credit Suisse was alerted to Lescaudron's misconduct (¶¶ 75–76):

> Credit Suisse Group AG ***overlooked red flags for years*** while a rogue private banker stole from billionaire clients ….
>
> The regulator, Finma, publicly censured Credit Suisse … for inadequately supervising and disciplining Mr. Lescaudron …, and said he had repeatedly broken internal rules…. Mr. Lescaudron's activities triggered hundreds of alerts in the bank that weren't fully probed … around ***a dozen executives or managers in Credit Suisse's private bank knew Mr. Lescaudron was repeatedly breaking rules but turned a blind eye***…
>
> It said Mr. Lescaudron's "disregard of internal directives and guidelines, the inadequate safeguarding of client documentation as well as unauthorized settlements of client transactions had been ***known to the bank*** …".

The *Financial Times* reported (¶ 76):

Credit Suisse Turned Blind Eye as Banker Stole from Clients

> Credit Suisse ***ignored brazen compliance violations*** by one of its top bankers for years as he stole from billionaire clients and flouted anti-laundering directives …. ***Repeated warning signs***, ***evidence of hundreds of suspicious transactions and four disciplinary proceedings were not acted upon by Credit Suisse*** ….

7. Continuing Money Laundering and Tax-Evasion Scandals

In 2020, Credit Suisse was ***again criminally indicted*** for money laundering "***on a grand scale***." The *Financial Times* reported (¶¶ 43, 71):

> … [I]nvestigators said the bank had processed more than $158 million of transactions ***for a clan of mafiosi and former top-level wrestlers***, ***earned from smuggling tonnes of cocaine into Europe and other illegal activities***.

Finews.com reported "**Credit Suisse Was Indicted in** … **Drug Scheme**" (¶ 72):

> [An] investigation into drug trafficking and money laundering of the proceeds … named ex-Credit Suisse executive as well as two alleged members of the criminal organization were also indicted …
>
> The bank is accused of failing to take … measures that were ... required to prevent the laundering of assets belonging to and under the control of the criminal organization.

In December 2020, *American Banker* reported: ***Credit Suisse Flagged for Anti-Money-Laundering Shortcomings*** (¶ 73):

> The Federal Reserve and the New York State Department of Financial Services have ordered Credit Suisse to repair its anti-money laundering program after shortcomings were found in the Swiss company's United States operation, according to an enforcement action released Tuesday.
>
> Examiners with the Federal Reserve Bank of New York uncovered problems at Credit Suisse's New York branch last year.

The Credit Suisse US/NY operations were infested with falsified assets and hidden losses. In addition to $10 billion in toxic securities/tax evasion penalties in 2015–2016, Credit Suisse had to write off $3.8 billion in "goodwill" it had carried on the books from the 15-year-old DLJ acquisition. In 2022-2023 after a billion more in DLJ losses — due to "shocking" "hidden giant risky bets," on high-risk speculative securities, Credit Suisse had to write off $2 billion more of bogus DLJ goodwill. ¶¶ 55, 292. The cumulative impact of all these losses, fines, penalties, settlements and investigations

took a horrible toll on Credit Suisse's finances and reputation and, in turn, destroyed the market price and capitalization of its common stock, causing damage to the Credit Suisse shareholders.[23] Credit Suisse shares sunk to a 24-year low. ¶ 294.

The misconduct and resulting damage to shareholders were caused by Defendants' breaches of their "nontransferable and inalienable duties," for "the overall management of the company" including "the accounting and financial control systems as required for the management of the company" and "in particular with regard to compliance with the law," as required by CO Art. 717, triggering their liability under Art. 754, as well as Arts. 41, 50, 55.

The mismanagement of Credit Suisse, was participated in, assisted, and furthered by the KPMG Defendants. Proper Internal Controls are a management responsibility, which KPMG participated in creating and implementing, and thus ended up auditing its own work — losing its independence. This triggers their liability under CO Art. 754 for participation in the mismanagement, and separate liability under CO Art. 755 for violating their own duties of due care in the audits. KPMG falsely certified that the Internal Controls were effective. ¶¶ 119–133, 404–442; RCS at 15–16, 25–33.

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[23] Credit Suisse's facilitation of tax evasion never ceased (¶¶ 44, 77, 395):

> The bank notoriously pleaded guilty in 2014 to criminal charges for "knowingly and willfully" helping U.S. clients hide offshore assets and income from the IRS…. The Senate report … accuses the bank of violating the terms of its 2014 plea agreement… The report… ***shows how compliance systems inside Credit Suisse broke down in the years before its collapse this month*** ….
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> "The committee's investigation uncovered major violations of Credit Suisse's plea agreement, including an ongoing and potentially criminal tax conspiracy involving nearly $100 million dollars and undeclared offshore accounts belonging to a family of dual US/Latin American citizens," a committee aide told CNBC.

Eamon Javers, *Credit Suisse Whistleblowers Say Swiss Bank Has Been Helping Wealthy Americans Dodge U.S. Taxes for Years*, CNBC, Mar. 29, 2023.

ARGUMENT

I. Plaintiffs Have Pleaded Valid Direct Claims for Relief for Individual Shareholders

A. The Pleaded Claims Are Direct Class Action Claims for Losses or Damage to Individual Shareholders, Not Derivative Claims for Credit Suisse

As the Supreme Court held in *Caterpillar, Inc. v. Williams*, Plaintiffs are the masters of their complaint. *See* 482 U.S. 386, 398–99 (1987). Plaintiffs assert direct damage claims for Credit Suisse shareholders between Oct. 22, 2013 and Mar. 17, 2023 under federal RICO and the Swiss CO. ¶ 1. Plaintiffs disclaim any language that could be construed to assert derivative claims. ¶¶ 2, 150.

Despite Plaintiffs' clear allegations and unequivocal disclaimer, Defendants mischaracterize Plaintiffs' claims under the CO as "derivative" and challenge Plaintiffs' "standing" to bring direct claims.[24] But the plain texts of CO Arts. 754 and 755 expressly provide "individual shareholders" with a direct cause of action against "members of the board of directors," "all persons engaged in the business management … of the company" and "[a]ll persons engaged in auditing" the company. CO Arts. 754–755. In addition, the general torts provision of CO Art 41 permits shareholders to assert direct claims against "[a]ny person who unlawfully causes damage to another." CO Art. 41. Consistent with the statutory texts, the Federal Supreme Court of Switzerland has held that "a shareholder may seek compensation of his direct damage under Article[s] 754 and 41." Perucchi ¶¶ 13–16, 17–45. As demonstrated in Swiss precedents and treatises, a shareholder is entitled to bring a direct claim against

[24] Although Defendants employ the term "standing," they do not challenge Plaintiffs' standing under Article III of the Constitution or this Court's subject-matter jurisdiction under Rule 12(b)(1). *See Bank of Am. Corp. v. City of Miami*, 581 U.S. 189, 196–97 (2017) (distinguishing between Article III standing and "prudential" or "statutory" standing). Of course, Plaintiffs have Article III standing because they suffered a loss as a result of the decline of Credit Suisse stock price. *See TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021) (a plaintiff has standing if "he suffered an injury in fact that is concrete, particularized, and actual or imminent"). Thus, Defendants' argument on "standing" raises only a merits issue relating to whether the statute (here, the Swiss CO) "grants the plaintiff the cause of action that he asserts." *Bank of Am.*, 581 U.S. at 196–97; *see also Lerner v. Fleet Bank, N.A.*, 318 F.3d 113, 129–130 (2d Cir. 2003) (analyzing "statutory standing" as "an element of the merits under a [Rule 12(b)(6)] motion for failure to state a claim"). Here, Swiss law governs the issue of whether Plaintiffs' claims are direct or derivative. *See AHW Inv. P'ship v. Citigroup Inc.*, 806 F.3d 695, 699 (2d Cir. 2015).

the company's directors, officers and auditors. *Id.*

Arguing the contrary, Defendants offer up the claims of their expert, Grolimund, who says that CO Arts. 754/755 do not provide the remedies for "individual shareholders," as stated in statutory texts. But Grolimund is 100% wrong. *See* Perucchi ¶¶ 30, 32, 71, 116. Contrary to express statutory texts, Grolimund's analysis is made up. The language of CO Arts. 754 and 755 are unambiguous — "individual shareholders" have a direct claim for "losses or damages" against all persons engaged in managing and auditing the company. *See* CO Arts. 754–755; Perucchi ¶¶ 13–19, 21–25, 128–129.

Aside from Grolimund's betrayal of the CO's express texts, the Court should reject his attempt to conflate CO Arts. 754 and 755 with CO Art. 756. As Perucchi states, these provisions are separate and distinct. Falling under Subsection A ("Liability"), CO Arts. 754 and 755 impose liability on corporate wrongdoers for "intentional or negligent breach of their duties." CO Art. 756, on the other hand, falls under Subsection B ("Damage to the company") and addresses derivative remedies in circumstances where "losses" are "caused to the company." CO Art. 756. As is plain in the texts of these varying provisions, loss or damage to the company is not an element of a claim under CO Arts. 754 and 755. Grolimund's assertion in ¶ 23 is wrong. *See id.*

In reality, misconduct by corporate officials often damages both the corporation and its shareholders. As recognized in *Ceribelli v. Elghanayan*, that the misconduct alleged in the Complaint damaged both Credit Suisse and its shareholders does not make this case derivative. *See* 990 F.2d 62, 63–64 (2d Cir. 1993) ("[t]here is no basis for applying a stricter rule [to restrict direct actions by shareholders] when the wrongful acts of the defendants also create a cause of action in favor of the corporation") (citing 12B William M. Fletcher, *Fletcher Cyclopedia of the Law of Private Corporations* § 5921, at 451–53 (perm. ed. rev. vol. 1984). In fact, under the "general common law rule," "a shareholder may bring an individual suit if the defendant has violated an independent duty to the shareholder, …

whether or not the corporation may also bring an action." *Ceribelli*, 990 F.2d at 63; *accord Borak v. J. I. Case Co.*, 317 F.2d 838, 842 (7th Cir. 1963) ("[a] breach of the duty owed to the shareholders of a corporation in that respect gives rise to a cause of action by the shareholders in their own right"). Claims by the corporation and claims by shareholders routinely proceed simultaneously. *See*, *e.g.*, *Loral Space & Commc'ns, Inc. v. Highland Crusader Offshore Partners, L.P.*, 977 A.2d 867 (Del. 2009); *In re Groupon Derivative Litig.*, 882 F. Supp. 2d 1043 (N.D. Ill. 2012).[25]

This is exactly what is happening in the pending litigations in this Court and in state court. Because the Swiss CO provides individual shareholders the right to assert direct claims via Arts. 754, 755, and 759, as well as Art. 41, Plaintiffs have brought this action in this Court under Rule 23. At the same time, several class actions have also been brought by purchasers — not holders — of Credit Suisse stock, asserting claims under the federal securities laws. Across Foley Square, a derivative action is proceeding in earnest in state court. *See Empls. Ret. Sys. for the City of Providence v. Rohner*, Index No. 651657/2022, slip op., at 1 (N.Y. Sup. Ct. N.Y. Cnty. Jan. 30, 2023) (Chang Ex. 11). The *FNC* motion in that case was denied. *Id.* Discovery is proceeding. Trial is set for next year. ¶ 176.

The state-court derivative case and this class case can both go forward with separate recoveries in each from separate defendants — for Credit Suisse/UBS in the derivative case and for the Class sued for in this case. No matter what happens with those derivative claims (*i.e.*, whether UBS ignores them, takes them over, dismisses them, prosecutes them or settles them),[26] they are not the direct class action damage claims asserted in this class action for holders of Swiss common shares. In complete

[25] *See also* Stephen J. Choi, *et al.*, *Piling on? An Empirical Study of Parallel Derivative Suits*, JOURNAL OF EMPIRICAL LEGAL STUDIES, 14, No. 4 (UNIV. OF MICH. 2017) (95% of shareholder derivative suits are accompanied by at least one parallel lawsuit).

[26] Why would these Plaintiffs who have sold their Credit Suisse shares and are not UBS shareholders bring a derivative claim when the recovery on that claim would go to UBS from which they could get zero benefit? In fact, because Plaintiffs are no longer Credit Suisse shareholders, they lack "standing" to sue derivatively. Their ability to do so was extinguished by the UBS merger.

disregard of the *City of Providence* case, however, Defendants attempt to recast this class case into the *Cattan* derivative case, which was brought on behalf of a different Credit Suisse shareholder, under a different set of *FNC* rules and different circumstances.[27] Attacking Plaintiffs' lawyers personally, as if they have done something wrong in pursuing remedies for innocent Credit Suisse shareholders, does not help resolve legal disputes.

Defendants also mischaracterize the Swiss-law claims as being for breach of "fiduciary duty." Not so. As reflected in the CO's plain text, the Swiss-law claims are for violation of express ***statutory duties*** pursuing ***statutory damage remedies***. None of those statutes uses the term "fiduciary duty." In any event, as the Second Circuit held in *Ceribelli*, a direct action is available to shareholders, so long as the defendant owes a duty to the shareholder — whether or not the duty is fiduciary in nature. *See* 990 F.2d at 64 ("[t]he availability of a direct action by the shareholder does not turn on whether the independent duty breached was a 'fiduciary duty'").

Nevertheless, having erected a derivative "strawman," Defendants attack it. But what they attack is a figment of their creation — "derivative claims" Plaintiffs expressly disclaim. ¶¶ 2, 150. This futile "strawman" exercise is motivated by Defendants' desire to hide behind affirmative defenses applicable only to derivative claims, such as release and discharge (discussed below) and to evade the deference due to Plaintiffs' choice of forum. In any event, Defendants' attacks and mischaracterizations cannot change the fact that Plaintiffs, as the masters of their complaint, plead only direct claims under CO Arts. 754/755 and 41, and refrain from any derivative claims under CO Art. 756. *See Caterpillar*, 482 U.S. at 398–99 (recognizing "the paramount policies embodied in the well-pleaded complaint rule — that the plaintiff is the master of the complaint").

[27] It was not until three months after the *City of Providence* case was allowed to go forward, that the separate derivative case, *Cattan v. Rohner*, was dismissed. *See* Index No. 652468/2020, slip op., at 17 (N.Y. Sup. Ct. N.Y. Cnty. Apr. 10, 2023) (Chang Ex. 12). That decision is on appeal.

B. The Pleaded Claims Are Not Derivative, But Even If Viewed as Seeking Derivative Relief, Such Relief Should Be "Molded" into a "*Pro Rata* Shareholder Recovery"

Defendants' "derivative claim" gambit fails. If the Cout gives any credence (it should not), however, to Defendants' assertion that damages suits under CO Art. 754 and 755 are "derivative in nature," the issue is, in fact, one of remedy — suitable for resolution after discovery and trial, but not at the pleadings stage. And in *Perlman v. Feldmann*, 219 F.2d 173 (2d Cir. 1955), the Second Circuit has provided clear guidance to resolve any remedy issues in the circumstances presented here.

In *Perlman*, shareholders commenced a ***derivative*** action against a controlling shareholder who allegedly sold his shares of the company at a premium under dubious circumstances to one Wilport, seeking to recapture the premium. *Id.* at 178. After determining the controlling shareholder breached his duties, the Second Circuit held that the shareholder plaintiffs, rather than the company, should receive the recovery from the derivative claims (*id.*):

> … [P]laintiffs … are entitled to a recovery in their own right, instead of in right of the corporation (as in the usual derivative actions), since neither Wilport nor their successors in interest should share in any judgment which may be rendered.…
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> ***
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> Judgment should go to these plaintiffs and those whom they represent for any premium value so shown to the extent of their respective stock interests.

Recognized as the "landmark case" decreeing the "molded recovery" or "*pro rata* shareholder distribution" doctrine, *Perlman* authorizes the trial courts to distribute "derivative" recoveries directly to shareholders. Edward J. Grenier, Jr., *Pro Rata Recovery by Shareholders on Corporate Causes of Action as a Means of Achieving Corporate Justice*, 19 WASH. & LEE L. REV., at 165 (1962). Consistent with *Perlman*, it is settled law that trial courts presiding over derivative actions have the discretionary, equitable authority to "mold" the recovery as particular facts and circumstances justify. *See, e.g.*, *Johnson v. Am. Gen. Ins. Co.*, 296 F. Supp. 802, 809 (D.D.C. 1969) ("[W]here a suit is logically derivative in nature …, courts have fashioned corporate relief which benefits only the minority, personally …. Relief could go to the corporation or to the plaintiffs depending on the development of the particular facts.");

Rankin v. Frebank Co., 47 Cal. App. 3d 75, 96 (Cal. App. 1975) ("A rule which permits a court to equitably distribute damages in a derivative action safeguards the interests of creditors while simultaneously protecting the interests of shareholders.").[28]

The molded recovery and *pro rata* distribution doctrines apply to circumstances involving self-dealing, improper entrenchment by insiders or sale of the company, as has occurred here:

> Derivative suits giving rise to direct recovery most frequently involve those situations in which the majority owners ***have voted themselves excessive salaries***, ***have converted assets of the corporation to their own use***; ***have sold … control of the corporation***; or ***have breached their fiduciary duty*** in other ways, such as … profiting from personal dealing with their own corporation.

Robert H. Jonson, *Shareholders' Right to Direct Recovery in Derivative Suits*, WYOMING L.J., Vol. 17, No. 3, Art. 2, at 213 (Dec. 2019). These circumstances are present here. Credit Suisse (itself a wrongdoer) and its assets have been sold to UBS and its liabilities assumed so its creditors are paid. Credit Suisse no longer has any public shareholders. It is a subsidiary of UBS, which has already reported a $30 billion profit on the deal.[29] Prior Credit Suisse insiders including some of the Credit Suisse individual defendants have had their "Credit Suisse equity awards" converted into UBS awards. *See* Chang Ex. 14 at 14–15. Thus, these wrongdoers — who allegedly self-dealt in and misused corporate assets — would benefit from any recovery being paid to Credit Suisse or UBS. The molded recovery or *pro rata* shareholder distribution approach will assure the recovery flows only to "innocent" Credit Suisse

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[28] *See also*, *e.g.*, W. Cary & M. Eisenberg, CASES AND MATERIALS ON CORPORATIONS, at 904–06 (5th ed. 1980); Note, *Individual Pro Rata Recovery in Stockholder's Derivative Suits*, 69 HARV. L. REV. 1314 (1956).

[29] UBS profited from the merger and thus from the alleged wrongdoing that allowed it to get a great bargain. The merger yielded a "record" $29–30 billion profit for the quarter after UBS integrated Credit Suisse to its books — the largest quarterly profit in history. John Sindreu, *Don't Say It Too Loudly but UBS Just Got a Steal of a Bank Deal*, THE WALL STREET JOURNAL, June 12, 2023. UBS's stock soared to $23.50 from below $17 when the "rescue" occurred. Margot Patrick, *UBS Posts Record Profit on Deal*, THE WALL STREET JOURNAL, Sept. 1, 2023. UBS has given up the $10 billion backup promise of the Swiss government. John Sindreu, *UBS Doesn't Need Government Cover to Make a Killing on Credit Suisse*, THE WALL STREET JOURNAL, Aug. 11, 2023 ("UBS may be implicitly [admitting] Credit Suisse was the deal of a decade.").

shareholders, not to Credit Suisse, its insiders or to UBS — the beneficiary of the merger.[30] Distribution procedures, well-honed in Rule 23 securities class actions, will provide an efficient means of distributing the recovery to the shareholder Class Members.

So, the direct-versus-derivative controversy raised by Defendants is much ado about nothing. Other than who gets the potential multi-billion-dollar recovery — *i.e.*, how any recovery will be ultimately allocated by the Court. Plaintiffs have a right to sue. They have alleged damages/losses to themselves and the members of the shareholder class — caused by conduct that also damaged Credit Suisse. In the circumstances where Credit Suisse has been sold, it does not matter in the end whether the Court views the case as a Rule 23 class action as Plaintiffs have pleaded or a derivative action as Grolimund has falsely claimed.[31] The result should be the same. The case should proceed on the merits. If Defendants are held liable, and their "it's-derivative" view prevails, the damages can be distributed as this Court directs, using its equitable powers based on all the facts emerging after discovery and trial. Indeed, the Complaint expressly prays for the Court to exercise its "equity power" to fashion such relief as is justified and necessary to benefit Credit Suisse's shareholders for the damages/losses suffered. Compl. at 266 (Prayer, E.).

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[30] The former Credit Suisse insiders pocketed more than $32 billion in illicit payments. Also, the merger provides that Credit Suisse "will obtain," prior to completion of the merger, "tail" D&O insurance for them covering events that occurred "before" the merger, *i.e.*, the claims asserted in the Complaint here. Chang Ex. 14 at 73. As Credit Suisse's corporate successor "by operation of law, Credit Suisse's assets, liabilities, contracts, will be transferred to UBS Group AG in their entirety" including the obligations of Credit Suisse for its New York subsidiaries' legal obligations and to indemnify its directors and officers, for negligence. *Id.* at 42. Credit Suisse shareholders, on the other hand, have been discarded, damaged and, to date, without remedy.

Were UBS to obtain the proceeds of this class action recovery of $120–$360 billion, its stock price would soar and the ex-Credit Suisse executives, who are now beneficiaries of the UBS equity programs, would reap a bonanza for their own misconduct.

[31] Grolimund's claims reflect a practical procedural problem facing Swiss courts. Switzerland has no class action procedure like Rule 23. Therefore, a Swiss court is powerless to grant a "group remedy" to all shareholders that is guaranteed to each "individual shareholder" by CO 754/755. But this lawsuit is in the SDNY, where the FRCP apply. *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 427 (1996). Rule 23 permits Plaintiffs to pursue their Swiss-law claims on behalf of the Class in SDNY.

II. The RICO Claims Are Well Pleaded

Defendants' attempt the same derivative claim gambit as to the RICO claims as they did with the Swiss-law claims. The same result should abide. As with the Swiss-law claims, Plaintiffs insist on pursuing their direct right of action for damage to their stock due to Defendants' violation of RICO. This cause of action is well pleaded. Plaintiffs' right to sue under RICO for damage to their property is express. Their Credit Suisse shares constituted property within the meaning of § 1962(c). *See Hawley v. Malden*, 232 U.S. 1, 9 (1914) ("[i]t is well settled that the property of the shareholders in their respective shares is distinct from the corporate property …, [and that] shares are personal property").[32] But if somehow embedded in the pleaded RICO claims is a derivative claim on behalf of Credit Suisse, then the "molded recovery" or "shareholder *pro rata* distribution" doctrine applies, as set forth above.

In *Elsevier Inc. v. W.H.P.R., Inc.*, this Court emphasized the need to weed out frivolous RICO allegations at the earliest possible stage of the litigation:

> Allegations of racketeering have been described as a "thermonuclear device." … The mere assertion of a RICO claim has an almost inevitable stigmatizing effect on those named as defendants. As a result, courts are charged with flushing out frivolous RICO allegations at the earliest possible stage of litigation.

692 F. Supp. 2d 297, 300 (S.D.N.Y. 2010) (McMahon, J.). Plaintiffs' RICO claims, however, are anything but frivolous. Respectfully, they meet any applicable pleading test. Indeed, if the facts alleged here do not state a RICO claim, what facts can?

A. Plaintiffs Have Standing to Bring RICO Claims Directly

Based on their mischaracterization of Plaintiffs' direct claims, the Credit Suisse Defendants say that Plaintiffs lack standing to bring RICO claims because their injury is purportedly "derivative" of Credit Suisse. Not so. To have standing to assert a RICO claim, Plaintiffs need only allege that

[32] *See also*, *e.g.*, *Bascuñán v. Elsaca*, 874 F.3d 806, 824 (2d Cir. 2017) (finding that plaintiff sufficiently alleged injury to property by alleging that defendants "fraudulently [took] possession of the bearer shares"); *Municipal Trust & Sav. Bank v. United States*, 114 F.3d 99, 101 (7th Cir. 1997) ("shares of corporate stock are personal property").

they sustain injury to their "property" "by reason" of Defendants' violations of § 1962. *See* 18 U.S.C. § 1964(c). Plaintiffs have sufficiently alleged injury to their property by identifying the over-$32 decline of Credit Suisse's stock price during the Class Period (*see*, *e.g.*, ¶¶ 3–4, 79, 140, 425, 481, 486; RCS at 1, 17, 30). *See Bascuñán*, 874 F.3d at 824 (holding that loss of stock constituted RICO injury). As Plaintiffs expressly allege, the destruction of shareholder value was "***separate from and disproportionate to***" the harm to Credit Suisse resulting from Defendants' mismanagement. ¶ 369. This is so because Defendants' mismanagement caused Credit Suisse to pay fines and penalties on the one hand ($35 billion), and destroyed shareholder value on the other hand ($120–$360 billion) due to the decline in the stock price. *See*, *e.g.*, ¶ 323. For example, Plaintiffs allege that, as a result of the Tuna Boats Scandal, "Credit Suisse has been damaged … in terms of the loan losses suffered and the expenses incurred in dealing with a catastrophe[,]" while Credit Suisse shareholders have been damaged by "its stock price … decline[.]" *Id.* Contrary to the Credit Suisse Defendants' assertion, there is nothing conclusory about Plaintiffs' allegations regarding the distinct — and direct — injury they and other Credit Suisse shareholders suffered. *See* ¶ 294. The Complaint is replete with allegations identifying the direct injury inflicted upon Credit Suisse shareholders, separate and apart from the harm suffered by Credit Suisse. *See*, *e.g.*, ¶¶ 2, 5, 8–11, 20, 26, 74, 79, 116, 140, 150, 160, 200, 202, 294, 297, 301, 323, 339, 352, 357, 368–369, 381, 388–393, 411, 425, 432–434, 439, 446–447; Compl. Prayer C. The right to recover damage from the destruction of Credit Suisse's stock price belongs to Plaintiffs and other Credit Suisse shareholders — and not to Credit Suisse.

In *Ceribelli*, shareholders brought a RICO claim against a residential cooperative's promoters, alleging that the promoters' racketeering activities — their concealment of defects in the residential building — caused both harm to the cooperative and "diminution in the value of plaintiffs' shares." 990 F.2d at 62. Relying on *Rand v. Anaconda-Ericsson, Inc.*, 794 F.2d 843 (2d Cir. 1986), the district court dismissed the RICO claim for lack of standing. *Ceribelli*, 990 F.2d at 63. The Second Circuit

reversed, holding that the shareholder plaintiffs sufficiently alleged their direct injury from the promoters' misconduct — diminution of share value — in violation of their "independent duty to the shareholder." *Id.* The Second Circuit reasoned that the shareholders cannot be precluded from bringing a RICO claim simply because the promoters' misconduct also injured the corporation. *Id.* (citing *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096 (2d Cir. 1988)).

The reasoning in *Ceribelli* and *Bankers Trust* applies here. Plaintiffs are seeking damages for themselves and other Class Members — the decline of Credit Suisse's stock price — resulting from Defendants' mismanagement and racketeering misconduct. The fact that Defendants' misconduct also injured Credit Suisse does not — and cannot — prevent Plaintiffs from asserting their own direct claims because Plaintiffs are not suing derivatively to recover damages to Credit Suisse.

The cases cited by the Credit Suisse Defendants, *Rand*, *Mason*, and *Palatkevich* are distinguishable because in each of these cases, the shareholder plaintiffs failed to allege direct injury they suffered or a direct duty owed to them. *See Rand*, 794 F.2d at 844; *Manson v. Stacescu*, 11 F.3d 1127, 1131 (2d Cir. 1993); *Palatkevich v. Choupak*, 152 F. Supp. 3d 201, 215–17 (S.D.N.Y. 2016) (McMahon, J.). *Manson* and *Rand* both recognize that where, as here, separate duties owed to the shareholders were violated and caused an injury to plaintiff separate from any injury to the corporation — a direct action is permissible under *Ceribelli*. This is what is alleged here.

Section 6 of the CO, entitled "Liability," includes CO Art. 716a, which states the "nontransferable" and "inalienable duties" of the Directors without limiting those duties to the corporation. CO Art. 717 requires they perform these "duties" with "all due diligence" and ***also*** "safeguarded the interests of the company." CO Arts. 754 and 755 provide that the Directors and all persons engaged in the management of the company are liable to both the company and to the "***individual shareholders***" for any intentional or negligent breach of their duties. In addition to the individual direct shareholder damage claims authorized by CO Arts. 754–755, CO Art. 756 provides

for a derivative remedy — "the individual shareholders are also entitled to sue for any losses caused to the company." No CO Art. 756 claim is pleaded here; in fact, it is disclaimed.

The language of the Swiss statutory scheme is clear. The duties owed by corporate Directors/Executives are owed to shareholders; and shareholders can sue individually for their "damage or losses arising" from a breach of those duties. The injury to the shareholders alleged here is also separate and distinct from any injury sustained by the corporation. The injury to Credit Suisse is the losses, mis-expenditure of its assets to protect insiders, reflected in the $35+ billion in corporate payments, fines and write downs. *See* Ex. A. The injury to the shareholders is separate — ***the decline in the stock price — damage to their property*** (***their shares***), ***of which Credit Suisse had no ownership interest and thus suffered no economic loss as the stock price fell***.

Manson is distinguishable because the plaintiff there, who was both a shareholder and a creditor, failed to allege any injury "related directly to the defendants' injurious conduct" or any "duties to [him] in his capacity as a shareholder." 11 F.3d at 1131. In contrast, Plaintiffs here allege both. Plaintiffs allege that Defendants owe statutory duties under CO Arts. 716a and 717. ¶¶ 428–431; Perucchi ¶¶ 47–48. Plaintiffs also allege that they were injured by the decline in the value of their Credit Suisse shares due to defendants' negligence. *See*, *e.g.*, ¶¶ 432, 481. This yields damages that aggregate over $120 billion, as 4 billion shares of stock fell from $34.62 to $2.01 per share, some $32+ in damage per share yielding $120 billion in shareholder losses/damages, the relief prayed for in the Complaint. Plaintiffs' injuries from the decline of Credit Suisse's stock price are separate and distinct from Credit Suisse's injuries — Credit Suisse paid fines and penalties and took losses and write-downs exceeding $35 billion, paid for with corporate funds or impacting corporate assets. *See*, *e.g.*, ¶¶ 3–4, 323; Ex. A.

Rand is also easily distinguishable. In *Rand*, shareholders of a bankrupt corporation sued. 794 F.2d at 845. But a bankruptcy trustee had been appointed and already asserted the same claims based

on the same facts and after a trial had lost. *Id.* at 845–46. Other litigations asserting the same wrongdoing had also been dismissed. *Id.* Thus, the shareholder plaintiffs' claims were dismissed, they were sanctioned under Rule 11, and enjoined from further suits as vexatious litigants. *See id.* at 846. Here, other claims based on some of the same facts are still pending in both federal and NY state court and Plaintiffs are not vexatious litigants, having never before sued any of these Defendants.

In all, Plaintiffs here seek to recover damages/losses only to themselves and other Credit Suisse shareholders. Plaintiffs do not seek damages for Credit Suisse. In fact, Plaintiffs and other Credit Suisse shareholders cannot be made whole, even if Credit Suisse was to recover these losses (which would flow to UBS). Credit Suisse's former shareholders own a miniscule amount of UBS shares, even assuming they held onto them. *Cf. Manson*, 11 F.3d at 1131 (the shareholder plaintiffs "would be made whole by a derivative action"). Here, absent molded recovery or *pro rata* shareholders distribution, a derivative recovery cannot make Credit Suisse shareholders whole.

This is so because the injury to the shareholders is the decline in Credit Suisse's stock price — damage to their Credit Suisse shares (their property under § 1962), in which Credit Suisse, as a corporation, had no interest. Credit Suisse, as a corporation, suffered no economic loss as the stock price fell; only Credit Suisse shareholders did. Nor was the injury/damage to each shareholder the same. The damage/loss each shareholder suffered will depend, as in all market-based damage claims, upon when and at what price their shares were acquired, and whether any subsequent losses "arise from" any intentional or negligent breaches of duties. CO Arts. 754(1), 755(1). Under tried-and-true Rule 23 procedures, each Class Member's calculated loss, *i.e.*, share of the recovery, as in all securities class actions, can be effectively distributed, and only after approval by this Court.

Finding RICO standing here is consistent with the rationale behind imposing a statutory standing requirement for RICO claims brought by shareholders:

> The proximate cause requirement serves the interests of judicial economy by allowing courts to determine in a derivative action one damage award that will restore the corporation and, therefore, its shareholders, creditors, and employees. "Recognizing claims of the indirectly injured would force courts to adopt complicated rules apportioning damages among plaintiffs removed at different levels of injury from the violative acts, to obviate the risk of multiple recoveries."

Manson, 11 F.3d at 1132 (quoting *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 269 (1992)). Here, because Plaintiffs and the class were directly injured in varying amounts, Plaintiffs have standing to bring a RICO claim. *See Ceribelli*, 990 F.2d at 63.

B. Plaintiffs' RICO Claims Fall Outside the PSLRA Bar Because They Are Not Based on Fraud in the Purchase or Sale of Securities

The so-called PSLRA bar precludes only RICO claims that are based on "any conduct that would have been actionable as fraud in the purchase or sale of securities." 18 U.S.C. § 1964(c). As the Second Circuit recently recognized in *D'Addario v. D'Addario*, the PSLRA bar "aim[s] to avoid duplicative recoveries for securities fraud violation" and to "'prevent litigants from using artful pleading to boot-strap securities fraud cases into RICO cases[.]" 75 F.4th 86, 93 (2d Cir. 2023) (quoting *MLSMK Inv. Co. v. JP Morgan Chase & Co.*, 651 F.3d 268, 274 (2d Cir. 2011)). Plaintiffs' RICO claims fall outside this bar.

That Credit Suisse and its operatives committed securities fraud — even criminal securities fraud — as part of the mismanagement of Credit Suisse does not make the mismanagement claims asserted under Swiss law into securities fraud claims under the U.S. securities laws. Plaintiffs state that their action "is not based on fraud or false or misleading statements … in connection with the purchase or sale of securities, but rather on [Defendants'] … breaches of their statutory duties and acts of mismanagement." ¶ 150; *see also* ¶ 448 ("no purchase or sale of securities by plaintiff[s] or other Class Members is pleaded nor is any purchase or sale necessary for recovery under the [RICO] causes of action pleaded"). This is so because no purchase or sale is necessary for recovery under the Swiss Law and RICO claims pleaded. *See* ¶¶ 427–486. "Holders" cannot sue under the Securities Exchange

Act of 1934; the holders of Credit Suisse shares have no claim under that Act.

The Credit Suisse Defendants pluck out a few isolated allegations of mismanagement conduct and label them bases for a securities-fraud claim. *See* Credit Suisse Defs.' Br. at 8–9 (quoting ¶¶ 5, 7, 49, 119, 157, 302). They are wrong. For example, Plaintiffs' allegations that the KPMG Defendants certified the adequacy of Credit Suisse's Internal Controls, thereby furthering the ongoing conspiracy, serve only as parts of Defendants' overall course of conduct of mismanagement of Credit Suisse, and are relevant to their fact-laden defense based on the statute of limitations.[33] These allegations do not, standing alone, form the basis of Plaintiffs' claims. Put another way, it is not Defendants' concealment of their mismanagement and lack of Internal Controls that gives rise to Plaintiffs' claims. Rather, Plaintiffs' claims arise from Defendants' acts of mismanagement and decades-long criminal misconduct and failure to implement adequate internal controls that led to the destruction of the value of Credit Suisse stock and to the injury to the property of Plaintiffs and other Class Members. Plaintiffs' losses do not stem from Defendants' concealment of their mismanagement of Credit Suisse or any purchase or sale of securities in reliance on such statements.

In *Kottler v. Deutsche Bank AG*, for example, investors in illegal tax shelters sued banks and an investment advisor for their alleged participation in the shelters, which involved the sale of securities. 607 F. Supp. 2d 447, 453, 457 n.9 (S.D.N.Y. 2009). Defendants sought dismissal of the RICO claims based on the PSLRA bar, asserting that the alleged tax fraud could not have occurred without the sale of securities. *Id.* at 457 n.9. Rejecting this assertion, the court said, "it [would be] inaccurate to suggest that the actual purchase and sale of securities were fraudulent," and that "it was the overall [tax fraud] scheme that allegedly defrauded the [p]laintiffs and [c]lass [m]embers." *Id.* Just like in *Kottler*, while Defendants' concealment of the mismanagement of Credit Suisse forms ***part*** of their misconduct, it

[33] False reassurances may rebut Defendants' affirmative defense based on the statute of limitations. But that is a different issue. *See* Argument VII, *infra*, at 73–75.

is the ***overall mismanagement*** — not any fraudulent purchase or sale of securities based on the concealment — that caused damage to Plaintiffs and Class Members. *See id.*; *see also*, *e.g.*, *Ouwinga v. Benistar 419 Plan Servs., Inc.*, 694 F.3d 783, 791 (6th Cir. 2012) (citing *Kottler* with approval and refusing to apply the PSLRA bar because "the securities transactions … were not integral to … the fraudulent scheme as a whole"); *see also Rezner v. Bayerische Hypo-Und Vereinsbank AG*, 630 F.3d 866, 872 (9th Cir. 2010) (refusal to apply the PSLRA bar because "[t]he connection … between the pledge of securities and the fraud" was "tenuous").

Adopting the reasoning of *Kottler*, *Ouwinga* and *Rezner*, *D'Addario* held that the PSLRA bars claims only when the alleged fraud is in the actual purchase or sale of securities, not when securities are incidental to the fraud. *D'Addario*, 75 F.4th at 94. Under *D'Addario*, *Kottler*, *Ouwinga* and *Rezner*, the Court should reject Defendants' attempt to hide behind the PSLRA bar. This is especially so because no securities-fraud claims are available to holders and also to the many Class Members who held Credit Suisse's common shares, which are traded outside the US, because, under *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010), the federal securities laws lack extraterritorial reach over securities traded outside the US. In short, there is no risk of "duplicative recovery" here because Plaintiffs do not — and some members of the Class cannot — bring a securities fraud case.[34] *See D'Addario*, 75 F.4th at 93. Each plaintiff victim is the master of his or her complaint.

C. The RICO Defendants Are Properly Named

The Credit Suisse Directors/Executives' responsibility for effective oversight, legal

[34] Contrary to the Credit Suisse Defendants' assertion, Plaintiffs' RICO claims do not become securities fraud claims simply because other purchasers of Credit Suisse ADSs have brought securities fraud claims based on the alleged concealment of the lack of adequate internal controls at Credit Suisse. Corporate misconduct can give rise to a range of legal claims. Those securities fraud claims are based on different legal theories and involve a different class period, and under *Morrison* non-US resident members of the "holder" class cannot sue under the US securities laws, as the offshore holders do here. Perpetrators of a huge international financial scandal can be sued under multiple theories in multiple venues by their victims.

compliance and financial control to assure criminal conduct did not occur is pleaded at ¶¶ 85–97, 223–224, 87–97, 82, 166, 167, 223–226. They and the Credit Suisse Entity Defendants operated Credit Suisse's US/Americas operations as part of "integrated oversight" and "management of the group" as "one economic unit", including the New York subsidiaries. ¶¶ 82, 166, 167.

They knowingly or recklessly "caused" or were involved "in causing" the RICO predicate acts. They were responsible for policing the conduct of subordinates to ensure legal compliance and adherence to the Conduct Code, to "maintain an exemplary control and compliance culture." ¶¶ 82-83, 166, 167, 203-235.

RICO claims are also asserted against KPMG LLP and "Steal the List Actors," Marcello, Middendorf, Whittle, Holder and Wada (¶¶ 124–133, 414–423, 436, 483), who caused the RICO predicate acts, part of the course of conduct and conspiracy. ¶¶ 31–54, 61, 64–69, 74–78, 450–469; RCS at 15–16, 22–33.

D. Plausible and Straightforward, the RICO Claims Must Be Asserted Given Defendants' Criminal Conduct

These civil RICO claims involve "respectable" white-collar types. Yet there are repeated criminal convictions. Few civil RICO cases come with convictions of the necessary predicate acts. These acts are beyond fair dispute. ***Their criminal offenses have either been admitted to or proven beyond a reasonable doubt***.

RICO is an express civil remedy as applicable to "Banksters" as "Gangsters." Negligent mismanagement, auditing, and a course of conduct/conspiracy have been alleged in the Swiss-law claims. The criminal conduct by greedy "banksters" and dishonest accountants damaged Credit Suisse shareholders. Proper representation of the Class, which includes US-resident holders of over 540 million Credit Suisse shares, mandates these RICO claims be asserted.

The RICO claims are based on the misconduct alleged in ¶¶ 435–486; RCS at 11–15, 17–19, 20–27, 31–32. The Complaint identifies several scandals between 2009 and 2022, each involving

RICO predicate acts of the same type, for the same or similar purposes, by the same or similar persons, including the KPMG "Steal the List" criminal escapade to further the course of conduct/conspiracy. As the predicate acts took place, were detected/exposed and billions in fines/penalties were paid and losses recognized, Credit Suisse stock fell from $34 to $2 at the close of the Class Period, damaging Class Members' property separate from any injury to Credit Suisse. ¶¶ 2–4, 8–10, 79, 202, 207; RCS at 30; *see also Bascuñán*, 874 F.3d at 824.

E. The RICO Enterprise — the "Credit Suisse Enterprise" — Is Adequately Pleaded

The RICO enterprise is the four Credit Suisse NY-based subsidiaries (which operated as part of a single integrated economic unit) and NY-based KPMG LLP, which were associated in fact. They constituted the "Credit Suisse Enterprise." The Credit Suisse Individual Defendants, and the KPMG RICO Defendants were each associated with the Enterprise. ¶¶ 6, 411, 442, 445, 485; RCS at 22–27.

RICO defines "enterprise" to include "any individual, partnership, corporation, association or other legal entity and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4). "A group of individuals associated in fact" refers to "a group of persons associated together for a common purpose of engaging ***in a course of conduct***." *United States v. Turkette*, 452 U.S. 576, 583 (1981). The touchstone of a racketeering enterprise is "an ongoing organization, formal ***or informal***." *Id.*

The RICO Defendants participated in this Credit Suisse Enterprise. Continuity is present. Each Credit Suisse annual report — year after year — stated the Directors/Executives and KPMG (as external auditor) had reviewed the Internal Controls and they were adequate — a ***consistent pattern of joint action for years for mutual economic benefit of all participants***. The joint continuing conduct of Credit Suisse and KPMG was necessary for the Enterprise to operate. The actors were the same or similar and related, *i.e.*, Credit Suisse and KPMG and their officials in an ongoing course of conduct/conspiracy. ¶¶ 435–486; RCS at 22–27.

Credit Suisse and KPMG were mutually interdependent. Neither could continue to proceed without the other. ¶ 442; RCS at 22–27. Credit Suisse could not operate without audits and certifications assuring the adequacy of its Internal Controls and accuracy of its financial statements. ¶¶ 404, 442, 447; RCS at 15, 23, 26–27. They communicated jointly with the shareholders in Credit Suisse's Annual Reports each year for years. KPMG does not get $30 million in yearly fees and — the Directors/Executives do not share in billions in illicit payments without Credit Suisse continuing to operate reporting large profits and billions in assets — certified by KPMG. Working together as a "continuing unit" they caused, committed, permitted and rewarded RICO predicate acts and obtained monies, revenues and income for (and from) the Enterprise, benefitting the RICO Defendants personally.[35] RCS at 15, 23, 26–27.

F. The RICO Predicate Acts Are Adequately Pleaded

Under RICO, "racketeering activity" includes Mail Fraud (18 U.S.C. § 1343); Wire Fraud (18 U.S.C. § 1343); Bank Fraud (18 U.S.C. § 1344); Visa Fraud (18 U.S.C. § 1546); and Money Laundering (18 U.S.C. §§ 1956–1957).

The regular ongoing business activities of Credit Suisse and KPMG LLP involved committing, permitting and even rewarding criminal acts — qualifying as RICO predicated acts. The acts pleaded related to the affairs of the Credit Suisse Enterprise. They furthered the goals of or benefitted the Enterprise and the individuals associated with it, mutually reinforcing illegal conduct and generating revenue and income for the participants. The Enterprise and each RICO defendant's role in the Enterprise enabled them to commit, cause or facilitated or rewarded the commission of the racketeering acts. The racketeering acts were committed at the behest of, or on behalf of, the

[35] This alleged enterprise is straightforward. It is certainly not an "enterprise of such sophistication and ominously pervasive reach that this court struggled to believe in such an elaborate and sinister operation," as found sufficient by this Court in *Maersk Inc. v. Neewra, Inc.*, 554 F. Supp. 2d 424, 464 (S.D.N.Y. 2008) (McMahon, J.).

Enterprise. The racketeering acts had the same or similar purposes, results, participants, victims or methods of commission. ¶¶ 435–482; RCS at 17–19, 20, 22–27.

Because of "systematic supervisory failures," permitting a "corrupt culture," and the failure to implement necessary Internal Controls, Credit Suisse became embroiled in an endless train of scandals, resulting in the predicate acts set out at ¶¶ 80–84, 85–97, 98–115, 223–224, 448–481, including the remarkable "steal the list" criminal convictions. RCS at 1–10, 11–15, 17–19, 20–27.

1. Terrorist Sanctions and Monetary Transfers Scandal

In December 2009, due to US/NY misconduct Credit Suisse pleaded guilty to evading terrorist sanctions via illegal money transfers to Iran, Sudan and others. It paid a $536 million penalty. Credit Suisse operatives "falsified the records of a financial institution" for at least 15 years, illegally transferring funds. ¶¶ 43, 230–234, 450–451. The acts of wire/mail fraud (18 U.S.C. §§ 1341, 1343) and evident money laundering are detailed in the DOJ Settlement Agreement, the Fed's Order to Cease and Desist, the Deferred Prosecution Agreement, and Criminal Information, all dated Dec. 16, 2009. ¶ 452.

2. Toxic Securities Scandal

The toxic securities scandal resulted in criminal proceedings in the SDNY. Three Credit Suisse bankers pleaded guilty to "***conspiracy to falsify the books and records of the bank***" ***including*** "***wire fraud***," in the SDNY. ¶ 453. They created false documents to inflate asset values to distort a key price index, mailing and sending them over the internet. *Id.* The June 2014 DOJ Release/Indictments Criminal Information provides specific criminal acts violating 18 U.S.C. §§ 1341 and 1343, and details how these actors in the scheme and conspiracy enriched themselves under the false pretense they were conducting legitimate, honest business and complying with Credit Suisse's Conduct Code. ¶¶ 453–460. Over the years Credit Suisse paid penalties/settlements of almost $7 billion for these predicate acts. ¶¶ 19–20(c)(d), 25–26, 49–60, 63, 66, 74, 181, 244–247, 298–299.

3. FOREX Trading Scandal

In November 2017, the NYDFS fined Credit Suisse $135 million for "unlawful, unsafe and unsound" practices in its NY FOREX exchange business. There were several emails and wire communications violating 18 U.S.C. §§ 1341 and 1343 in furthering and executing this FOREX misconduct as part of the conspiracy/course of conduct (¶¶ 300, 459–460):

> … from at least 2008 to 2015, Credit Suisse consistently engaged in unlawful, unsafe and unsound conduct by failing to implement effective controls over its foreign exchange business.
> … for many years, Credit Suisse foreign exchange traders participated in multi-party electronic chat rooms, where traders, discussed coordinating trading activity and attempted to manipulate currency prices or benchmark rates. By improperly working together, these traders sought to diminish competition among banks, allowing these banks and traders to reap higher profits from the execution of foreign exchange trades at customers' expense. Credit Suisse traders also engaged in improper activity by sharing of confidential customer information, again enhancing their own profits ….

4. United States/New York Tax-Evasion Scandals

Credit Suisse's assistance of tax evasion in the US/NY dates back to 1953 and continued to recent times. It has involved repeated criminal indictments and guilty pleas, involving predicate acts of wire, mail and visa fraud. Between 2011 and 2014, ***eight*** Credit Suisse bankers pleaded guilty. ¶¶ 31–54, 61, 64–69, 71–78, 461–465; 18 U.S.C. §§ 1341, 1343, 1546. A DOJ press release for the plea of one of the bankers — Bergantino — lays out this misconduct (¶¶ 239, 461):

> … [W]ithdrawals from … undeclared accounts by sending multiple checks, each in amounts below $10,000, to clients in the United States … holding clients' mail from delivery to the United States …. Moreover, [the] clients concealed their ownership and control of foreign financial accounts by holding those accounts in the names of nominee tax haven entities, or structures, which were frequently created in the form of foreign partnerships, trusts, corporations or foundations.
>
> ***
>
> Bergantino [traveled] to the United States … to meet with clients, taking careful steps to conceal the purpose of his visits from U.S. law enforcement. He used private couriers to send clients' account statements to the U.S. hotels where he stayed, so that he would not be caught traveling with clients' statements in his possession. In addition, Bergantino obtained "travel" account statements for each client he intended to visit which were devoid of Credit Suisse's logo and account or customer identification information and used business cards that Credit Suisse provided that contained only his name and office number and did not carry the Credit Suisse name

> or logo. On entering the United States, Bergantino provided misleading information regarding the nature and purpose of his visit to U.S. Customs and Border Protection authorities.

In May 2014, Credit Suisse ***itself*** pleaded guilty and paid a $2.6 billion fine. ¶ 462. The Credit Suisse Plea Agreement in *United States v. Credit Suisse AG*, Crim. No. 1:14-CR-188-RBS (E.D. Va.), further detailed the conduct of mail/wire/bank fraud, visa fraud, and money laundering, violating 18 U.S.C. §§ 1341, 1343, 1956–1957. ¶¶ 461–465.

> Credit Suisse AG pleaded guilty today to conspiracy to aid and assist U.S. taxpayers in filing ***false income tax returns and other documents with the Internal Revenue Service*** (***IRS***). … Credit Suisse acknowledged that… it operated an illegal cross-border banking business that knowingly and willfully aided and assisted thousands of U.S. clients in opening and maintaining undeclared accounts and concealing their offshore assets and income from the IRS.
>
> ***
>
> Credit Suisse employed a variety of means to assist U.S. clients in concealing their undeclared accounts, including by:
>
> assisting clients in using sham entities to hide undeclared accounts;
>
> submitting IRS forms that falsely stated, under penalties of perjury, that the sham entities were the beneficial owners of the assets in the accounts;
>
> ***
>
> facilitating withdrawals of funds from the undeclared accounts by either providing hand-delivered cash in the United States or using Credit Suisse's correspondent bank accounts in the United States;
>
> ***structuring transfers of funds to evade currency transaction reporting requirements***, ***and providing offshore credit and debit cards to repatriate funds in the undeclared accounts***.
>
> In May 2014, the Fed (¶ 464):
>
> announced that Credit Suisse will pay a $100 million penalty for unsafe and unsound practices and failure to comply with the federal banking laws governing its activities in the United States.
>
> ***
>
> The Board's cease and desist order and assessment of civil money penalty against Credit Suisse, are based on the institution's ***inadequate risk-management and compliance program***, ***and its failure to conduct and accurately report to the***

> ***Federal Reserve the operations of its New York representative office in compliance with U.S. banking laws*** ….

5. Princelings "Pay off" Scandal

The Credit Suisse Princelings "pay off" criminal plea/penalty in the EDNY detailed mail/wire and bank fraud RICO predicate acts (18 U.S.C. §§ 1341, 1343) (¶¶ 69, 466; RCS at 7–8):

> [Credit Suisse] reached a resolution with the Department of Justice and agreed to pay a $47 million criminal penalty for its role in a scheme to corruptly win banking business by awarding employment to friends and family of Chinese officials, including ***repeated mail and wire communications***.

6. Tuna Boats/Bonds Scandal

Credit Suisse bankers and Credit Suisse pleaded guilty to criminal conspiracy in EDNY and paid $547 million in penalties for wire fraud and money laundering (18 U.S.C. §§ 1341, 1343, 1956–1957). ¶¶ 64–68, 314–323. The DOJ's release (¶¶ 468-469) stated:

> … Credit Suisse Group AG entered into a three-year deferred prosecution agreement with the department in connection ***with a criminal information charging Credit Suisse Group AG with conspiracy to commit wire fraud*** ….
>
> [Earlier Credit Suisse employee] Andrew Pearse … ***pleaded guilty to conspiracy to commit wire fraud*** …. Surjan Singh, … ***pleaded guilty to conspiracy to commit money laundering***, … [and] Detelina Subeva … ***pleaded guilty to conspiracy to commit money laundering***.

7. Financial Institution "Bank" Fraud

Credit Suisse Individual Defendants received and then sold to the Bank millions of shares of Credit Suisse common stock under false presentations of legal and Conduct Code compliance as part of their unjustified, illegal compensation receiving hundreds of millions of dollars in proceeds (¶¶ 473–478; RCS at 31–32). *See* 18 U.S.C. §§ 1341, 1343, 1344.

8. The "Steal the List" Scandal

KPMG's criminal "steal the list" scandal in NY was to advance the ongoing course of conduct/conspiracy and to avoid detection and exposure of defects in Credit Suisse's Internal Controls and KPMG's audits in PCAOB's "surprise" reviews by destroying/altering work papers. The KPMG RICO Defendants who orchestrated "steal the list" were convicted or pleaded guilty of

mail/wire fraud, 18 U.S.C. §§ 1341, 1343. News reports tell the tale. Judicial opinions detail the mail and wire fraud. ¶¶ 126–133, 411–421; RCS at 11–15, 17–19, 20–27.

The misconduct was described in (a) PCAOB releases Apr. 5, 2022 and Dec. 6, 2022; (b) Jan. 22, 2018, SEC release; (c) Jan. 23, 2018 and Mar. 11, 2019, releases by USA for the SDNY; (d) indictments in *United States v. Middendorf*, Criminal No. 18 Cr. 0036 (SDNY); and (e) opinions July 17, 2008 and Sept. 9, 2019, by US District Judge J. Paul Oetken in the *Middendorf* case (¶¶ 411–423, 479–481). *See* 18 U.S.C. §§ 1341, 1343.[36]

G. The RICO Course of Conduct/Conspiracy Is Adequately Pleaded

Participation in a course of conduct under § 1962(c) ***or*** participation in a conspiracy creates liability under 18 U.S.C. § 1962(c)–(d) and § 1964. *See Maersk*, 554 F. Supp. 2d at 465. In *Maersk*, after upholding the adequacy of the NY state law claim involving the same facts (like the Swiss-law claims), this Court found plaintiffs "have sufficiently pleaded a RICO conspiracy." *Id.*

Even if the Directors/Executives each did not make each or any of the offending mailings, wires, phone calls or themselves sneak into the U.S. to help tax cheats, they are alleged to have "caused" that illegal conduct because they knew that the illegal predicate acts would follow in the ordinary course of conduct of Credit Suisse's business given its "business model" and their years of tolerating and rewarding the ongoing illegal conduct. This Court stated (*Maersk*, 554 F. Supp. 2d at 463–64):

> I find that Plaintiffs have alleged a causal role in the fraudulent mailings and wire communications, particularly through their well-pleaded allegations of [Defendant's] participation in a common law conspiracy to commit fraud, as either a principal or co-conspirator of the New York Defendants. … The many detailed allegations that plead this complex international conspiracy suffice to meet the particularity requirements, and to sufficiently tie [Defendants] to the scheme.

The course of conduct/conspiracy here involves the deficiencies in Credit Suisse's Internal

[36] The recent remand of the Middendorf appeal is of no moment in light of the substantial allegations of the predicate acts. *See, e.g.*, ¶¶ 126–133, 479–481.

Controls. KPMG got over $30 million per year from Credit Suisse while its officials participated in the mismanagement of Credit Suisse and in falsely certifying Credit Suisse's Internal Controls. Without that certification of Credit Suisse's financial statements (*see* ¶¶ 7, 20(f), 122), Credit Suisse could not have continued to operate. In March 2023, when PwC disclosed that Credit Suisse lacked adequate Internal Controls,[37] Credit Suisse's stock collapsed. ¶ 3. Large banks cannot operate unless their external statutory auditor certifies their internal controls are adequate. ¶ 412. Without this, everything is suspect and at greatly increased risk. Depositors and counterparties flee, the business implodes, and shareholders are damaged. Credit Suisse's stock collapse when PwC confirmed the Bank's lack of Internal Controls. ¶¶ 3–10, 213–221.

Because of the importance of adequate Internal Controls, each CSGAG Annual Report during the Class Period contained the following (RCS at 26–27; Chang Exs. 1, 2):

> The management of the Group is responsible for establishing and maintaining adequate internal control ….
>
> Auditing forms an integral part of corporate governance at the Group. Both internal and external auditors have a key role to play by providing ***an independent assessment of our operations and internal controls***.
>
> ***
>
> … [T]he Internal Audit team evaluates and enhances the effectiveness of our risk management, control [and] submits periodic internal reports and summaries thereof to the management teams as well as the Chairman and the Audit Committee chairman …. Internal Audit coordinates its operations with the activities of the external auditor for maximum effect.
>
> ***
>
> KPMG attends all meetings of the Audit Committee and reports on the findings of its audit and/or interim review work. The Audit Committee reviews on an annual basis KPMG's audit plan and evaluates the performance of KPMG and its senior representatives ….
>
> ***
>
> The CEO and CFO concluded that, as of December 31, [YEAR] ***the design and operation of the Group's disclosure controls and procedures were effective***, ***in all material respects*** ….
>
> ***

[37] Because of KPMG's "steal the list" criminal scheme in NY, Credit Suisse was forced to retain PwC as a new external auditor in 2021. ¶ 5.

> ***Based upon its review and evaluation, management, including the Group CEO and CFO, has concluded that the Group's internal control over financial reporting is effective*** ….
>
> ***
>
> ***The Group's independent registered public accounting firm [KPMG] has issued an unqualified opinion on the effectiveness of the Group's internal control over financial reporting as of December 31, [2011–2021]*** ….

Yet, Credit Suisse was embroiled in proceedings where regulators repeatedly concluded that Credit Suisse lacked adequate Internal Controls. ¶¶ 411–423.

KPMG "stole the list" to make it less likely PCAOB would discover and make public Credit Suisse's Internal Controls deficiencies, which would have disrupted the course of conduct/conspiracy. ¶ 479. When KPMG was replaced in 2020, it did not make a "noisy" withdrawal. It permitted continued use of its prior "clean opinions" furthering the course of conduct/conspiracy. ¶ 442.

III. Defendants' *Forum Non Conveniens* Motion Should Be Denied

Core rules from the Supreme Court[38] and Second Circuit[39] precedents on *FNC* are:

- A US plaintiff's choice of a domestic forum is "presumed to be convenient," entitled to "substantial deference" and a "strong presumption" which "should rarely be disturbed," *i.e.*, dismissal is "the exception."

- If the alternative forum is foreign — "extra deference" is due to the plaintiffs' forum choice. The need to apply foreign law does not alone compel an *FNC* dismissal.

- Defendants bear the burden of "proving" a "presently available alternative forum" and, if there is one, that it is also an "adequate" alternative forum. Defendants must prove plaintiffs can access the alternative forum and every defendant can be sued there.

- If an alternative forum is "presently available" and "adequate", Defendants must then "clearly show" — the public and private factors "tip strongly" or "weigh heavily" in their favor — demonstrating the foreign forum is substantially more convenient and that defending in NY would subject them to "oppression and vexation … out of all proportion

[38] *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981); *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947); *Koster v. Am. Lumbermans Mut. Cas. Co.,* 330 U.S. 518 (1947).

[39] R. *Magalala Co. v. MG Chem. Co., Inc.*, 942 F.2d 164 (2d Cir. 1991); *Wiwa v. Royal Dutch Petroleum Co.*, 26 F.3d 851 (2d Cir. 2000); *Guidi v. Intercontinental Hotels Corp.*, 224 F.3d 142 (2d Cir. 2000); *Iragorri*, 274 F.3d at 65; *DiRienzo v. Philip Serv. Corp.*, 294 F.3d 21 (2d Cir. 2002); *Bigio v. Coca-Cola Co.*, 448 F.3d 176 (2d Cir. 2006); *Norex v. Petroleum Ltd. v. Access Indus.*, 416 F.2d 146 (2d Cir. 2006); *Celestin v. Caribbean Airmail, Inc.*, 30 F.4th 133 (2d Cir. 2022).

to plaintiff's convenience."

- The existence of related litigations in the alternative forum does not compel an *FNC* dismissal, but the existence of related litigations in the home forum weighs against granting an *FNC* dismissal.

- The doctrine of *FNC* is never to be applied where it will result in an injustice to plaintiff.

Consistent with these rules, this Court has repeatedly refused to dismiss actions based on *FNC* in circumstances far more favorable for a foreign forum.[40] In *Ramirez de Arellano v. Starwood Hotels & Resorts*, 448 F. Supp. 2d 520 (S.D.N.Y. 2006) (McMahon, J.), defendants included U.S. corporations with principal places of business in NY. That *FNC* motion struck this Court as "***counter intuitive***" — "***strange***." *Id.* at 524. Here, all the entity Defendants are NY citizens or residents and ***90***% of the Individual Defendants are NY-based. This *FNC* motion here is likewise "strange."

Maersk, 554 F. Supp. 2d at 424, involved an international scheme — multiple citizenships — years of misconduct. Finding plaintiffs' choice of a NY forum "was made more from considerations of convenience than from forum shopping" this Court accorded that choice "greater deference," making Defendants' burden more onerous. *Id.* at 453. The Court found that defendants failed to carry their burden to establish a "presently available alternative forum in which plaintiff can litigate its claim," and to "clearly show" the other relevant factors "strongly" favor dismissal. Even though Kuwait provided an adequate alternative forum and the parties engaged in related litigation there, that complaint (like this one) alleged "international" wrongdoing. Thus, while "relevant evidence" was spread over the world, "a great deal occurred in [NY]," where there were contractual consents to jurisdiction and forum. *Id.* at 454.

[40] *See*, *e.g.*, *Mars Advertising Eur. Ltd. v. Young & Rubicam, Inc.*, 2013 U.S. Dist. LEXIS 60389 (S.D.N.Y. Apr. 24, 2013) (McMahon, J.) (denying an *FNC* motion because it was "logical" for plaintiffs to sue in NY where defendants were "at home"); *Mago Int'l LLC v. LHB AG*, 2014 U.S. Dist. LEXIS 85410 (S.D.N.Y. June 18, 2014) (McMahon, J.) (giving the NY forum choice by a NY "firm" "great deference," because it was "clearly motivated" by convenience and financial concerns).

A. The Domestic Plaintiffs' Forum Choice Is Entitled to Substantial Deference

Because domestic Plaintiffs have chosen this U.S. forum it is ***presumed*** to be convenient, as in fact it is.[41] *See Koster*, 330 U.S. at 527 ("[a] real showing of convenience by a plaintiff who has sued in his home forum will normally outweigh the inconvenience the defendant may have shown"). A NY-resident Plaintiffs' choice of NY forum must be accorded extra weight where, as here, the proposed alternative forum is in a foreign country. *Swift & Co. Packers v. Compania Colombiana Del Caribe*, 339 U.S. 684, 697 (1950). Plaintiffs' selection of the SDNY forum is driven by considerations of convenience and cost. NY is the only forum in the world where the claims asserted can actually be litigated by their contingent-fee lawyers who will fund the prosecution of the case on a class basis against all the named Defendants in a jury trial with live witnesses. ¶¶ 154, 194. The "substantial deference" due Plaintiffs' choice of forum becomes complete where, as here, the chosen forum bears a significant factual connection to the claims asserted, is where 90% of the Defendants live, work or do business, and where Credit Suisse has contractually consented to jurisdiction/venue and used New York's courts for its own purposes — suing here and settling suits here — invoking the jurisdiction of US courts for its own benefit. *See* ¶¶ 156, 172, 175.

The overwhelming factual nexus between NY and the parties, claims and underlying wrongdoing are pleaded at ¶¶ 80–84, 119–133, 148–189. Litigation over this massive scandal belongs in the SDNY. US residents are suing US entities. Much of the wrongdoing took place here; Credit Suisse stock traded on the NYSE. Owners of 540 million shares reside in the US. SDNY is the most sophisticated trial court in the world for class action suits involving international wrongdoing and parties. Often times NY offers not only the most convenient, but as here, the only forum in the world where the suit can be prosecuted. *See In re Assicvrazioni Generali S.P.A. Holocaust Ins. Litig.*, 228 F. Supp.

[41] "The deference owed to the forum choice of domestic plaintiffs cannot be reduced solely because they chose to invest in a foreign entity and may have expected to litigate abroad on certain matters." *Otto Candies, LLC v. Citigroup, Inc.*, 963 F.3d 1331, 1339–40 (11th Cir. 2020).

2d 348 (S.D.N.Y. 2002) (class actions against foreign insurance companies which refused to honor claims of Holocaust victims/decedents; "great deference" given plaintiffs' forum choice citing "severe inconvenience" to individual plaintiffs to hire non-contingent fee counsel to sue in Europe, recognizing forcing plaintiffs to litigate there "would be the death knell for their claims"); *Peterson Energia Inversora SAV v. Argentine Republic & YPFSA S.A.*, 2020 U.S. Dist. LEXIS 99207 (S.D.N.Y. June 5, 2020) (US plaintiffs' suit against Argentina over a $16 billion bond default; Argentina law applied and it provided an adequate alternative forum, yet *FNC* motion denied); *Irish Nat'l Ins. Co. v. Aer Lingus Teoranta*, 739 F.2d 90, 91 (2d Cir. 1984) (*FNC* dismissal inappropriate where trial in alternative forum "will realistically never occur").[42]

B. Defendants Have Not Carried Their Burden of Proof to Displace the Domestic Plaintiffs' Choice of Forum

Defendants cannot meet their burden of "clearly showing" Switzerland is (1) a "presently available"; (2) an adequate "alternative forum," where the class action claims pleaded can actually be litigated; and (3) that the analysis of the public and private *FNC* factors "tips heavily" or "strongly" in their favor. *Bank of Credit & Commerce Int'l (Overseas) Ltd. v. State Bank of Pakistan*, 273 F.3d 241, 246 (2d Cir. 2001) (the party seeking dismissal "bears the burden on all elements of the motion").

Establishing both the present availability of an alternative forum and its adequacy is a burden borne by a defendant. *USHA (India) Ltd. v. Honeywell Int'l Inc.*, 421 F.3d 129, 135 (2d Cir. 2005). Due

[42] The cases cited by Defendants are easily distinguishable. *Veiga v. World Meteorological Org.*, 486 F. Supp. 2d 247 (S.D.N.Y. 2007) (foreign plaintiffs, conduct all in Switzerland, "strong inference" of forum shopping); *Erausquin v. Notz, Stucki Mgmt.*, 806 F. Supp. 2d 712 (S.D.N.Y. 2011) (foreign plaintiffs and foreign defendants and foreign witnesses, choice of forum motivated by forum shopping, defendants consented to jurisdiction in Switzerland and waived Swiss law defenses); *In re Optimal U.S. Litig.*, 837 F. Supp. 2d 244 (S.D.N.Y. 2011) (foreign plaintiffs, foreign defendants, Defendants consented to service in Switzerland and waived Swiss law defenses); *Fustak v. Banque Populaire Suisse*, 546 F. Supp. 506 (S.D.N.Y. 1982) (foreign plaintiffs, foreign defendants, with pending lawsuit in Switzerland); *Schertenleib v. Traum*, 589 F.2d 1156 (2d Cir. 1978) (foreign plaintiffs (a Swiss judge), all conduct in Switzerland, defendant consented to jurisdiction in Switzerland where existing litigation between the parties was ongoing and agreed to waive all Swiss defenses, and that case could be re-filed in SDNY if Swiss court declined jurisdiction).

to the unique structure of Swiss legal rules/systems and its rules that discriminate against US domiciles who even try to file a complaint there, make it neither a "presently available" nor "adequate" alternative forum. *Norex,* 416 F.3d at 160; *see also Iragorri*, 274 F.3d at 73.

1. Switzerland Is Not a "Presently Available" Forum Because the Mandatory Bond Discriminates Against These U.S. Plaintiffs

"Presently" means: "now," "currently", "at this moment." BLACK'S LAW DICTIONARY, at 1183 (6th ed. 1990) (defining "present" as "[n]ow existing"). "Available" means: "[s]uitable; useable; accessible; obtainable; present or ready for immediate use." *Id.* at 135. "The first prong" — finding a "presently available" alternative forum — "offers no discretion to trial courts." Joel H. Samuels, *When is an alternative forum available? Samuels, Rethinking the Forum Non-Conveniens Analysis*, 85 IND. L. J. 1059, at 1061 (2010). The proposed alternative forum is either available or not; if not, the *FNC* motion is doomed. *See id.*

The Swiss legal system — no matter how honest and efficacious it may be to those who have access to it — is not "presently available" to these US-resident Plaintiffs. *Cf. Maersk* , 554 F. Supp. 2d at 453 (the Court is "loath to impugn the integrity or efficacy of the courts of a foreign jurisdiction"). The operation of Swiss procedural rules precludes a finding that Switzerland is a presently available forum for Plaintiffs' claims. Perucchi ¶¶ 78–95; *see also* CPC Arts. 59, 60, 98, 100. In Switzerland, a plaintiff lodges a complaint. But it is not deemed filed — accepted, *i.e.*, treated as filed — until the court makes required findings under CPC Art. 59. In order for the complaint to be "accepted," plaintiff must post a bond for court costs. But for a plaintiff who is a US resident, there is an additional hurdle. Here, because and only because Plaintiffs are US domiciles, they are required to post a cash bond from a Swiss bank or insurance company for defense fees and costs. The amount of both bonds depends on the amount of damages prayed for. The Swiss court cannot waive the fee/cost bond, if any defendant requests it. So, to get the action "accepted" as filed, Plaintiffs here would be required to post two cash bonds — one for defense legal fees and costs, and another for court costs.

Due to the potential damages sought by Plaintiffs, the amount of the bonds would be prohibitive. Under Swiss law, the amount of security depends upon the damages sought. The more damage inflicted, the larger the security required. Perucchi ¶¶ 78–95. There are 4 billion shares of Credit Suisse stock outstanding. The *prima facie* damages prayed for in this Complaint are quite large, *i.e.*, $34 – $2 = $32 loss per share X 4 billion shares =$120+ billion potential damages, without RICO treble damages. The bonds would be $500 million due to the rules in Zurich. *Id.* ¶¶ 83–95. If this seems unbelievable, it is what the Swiss rules say. Perhaps that is why there has never been a sizable securities class action in Switzerland involving a Swiss corporation. Perucchi ¶¶ 96–105. But to these Plaintiffs, it really does not matter if the bond is $10,000, $100 million or $2 billion. They cannot post it.[43] *Id.* ¶¶ 96–107. This makes the Swiss forum "presently unavailable." *Id.* ¶ 105.

All told, Plaintiffs cannot bring their claims in Switzerland, where they could not hire contingent fee lawyers who can finance the litigation without recourse. Even if Swiss counsel were available, Plaintiffs cannot post the mandatory cost bond required by Swiss procedural rules, which is applicable only to non-Swiss residents and thus discriminates against the US-resident Plaintiffs. ¶ 191; Perucchi ¶¶ 78–95. Accordingly, Defendants cannot establish a presently available alternative forum.

2. A Swiss Forum Is Not an Adequate Alternative Forum

A Swiss forum is also not an adequate alternative for structural reasons.[44] Defendants have

[43] Financial hardship alone does not prevent *FNC* relief. But it is a factor to be considered. *Reid-Walen v. Hansen,* 933 F.2d 1390, 1393 n.2, 1398 (8th Cir. 1991); *see also Fiorenza v. U.S. Steel Int'l, Ltd.*, 311 F. Supp. 117, 120–21 (S.D.N.Y. 1969).

[44] If there is an "available" alternative forum it must also be "adequate" as well. If there is not, dismissal will be fatal to the case. Instead of resulting in the case being litigated in a "more convenient" forum — the case will die plaintiffs get no remedy and defendants will escape accountability. *Piper Aircraft,* 454 U.S. at 254 (where the remedy provided by the foreign forum, however is "so clearly inadequate or unsatisfactory that it is no remedy at all, the unfavorable change in law may be given substantial weight and the district court may refuse to dismiss based on the interests of justice"); *In re Arbitration between Monegasque v. Naknaftogaz of Ukraine*, 311 F.3d 488 (2d Cir. 2002) (the alterative forum is inadequate when there is a "complete absence of due process or an inability of the forum to provide substantial justice to the parties").

not proven that Swiss courts have personal jurisdiction over all the Defendants. Subject matter jurisdiction over the RICO claim does not exist there. Lawyers cannot be retained on a contingent-fee basis. Rule 23 type class actions are not unavailable there. Nor are jury trials. Perucchi ¶¶ 63–113.

Defendants have not proven Marcello, Whittle, Middendorf, Sweet, Holder, and Wada can be sued in Switzerland. They have no known contact — physical or otherwise with Switzerland. Perucchi ¶¶ 73–77. None of them have consented to suit there. A core rule of *FNC* jurisprudence is defendants must prove ***every*** Defendant can be sued in the alternative forum. *See Jota v. Texaco Inc.*, 157 F.3d 153, 159 (2d Cir. 1998) (reversing *FNC* dismissal where defendant was not amenable to suit in alternative forum); *Pollux Holding, Ltd. v. Chase Manhattan Bank*, 329 F.3d 64, 75 (2d Cir. 2003). District courts deny *FNC* motions when not all defendants are amenable to suit in the alternative fora. *See Amimon Inc. v. Shenzhen Hollyland Tech Co.*, 2021 U.S. Dist. LEXIS 229162, at *20 (S.D.N.Y. Nov. 30, 2021); *Rio Tinto PLC v. Vale S.A.*, 2014 U.S. Dist. LEXIS 174336, at *43 (S.D.N.Y. Dec. 17, 2014).

CF 135 Flat LLC v. Triadou SPV S.A., 2016 U.S. Dist. LEXIS 140186 (S.D.N.Y. June 21, 2016), involved a commercial dispute with events in NY and Switzerland. Plaintiff asserted a "perfectly reasonable" RICO claim due to the "*bona fide*" connection of the claims to NY and deference was due the domestic forum. Movants failed to show that just one defendant, who was in a French jail, was subject to personal jurisdiction in Switzerland. Therefore, "Switzerland is not an adequate alternative forum." Without this reach of personal jurisdiction over every defendant sued, the alternative forum is inadequate as a matter of law. That ends the "adequacy" inquiry.

Plaintiffs also cannot litigate their RICO claims in Switzerland because the Swiss courts lack subject-matter over RICO claims. A complaint containing a RICO claim would be dismissed *sua sponte/ex-officio* under CPC Arts. 59–60. Perucchi ¶¶ 112–113. Although Swiss law contains a habitual criminal offense statute, it is a criminal statute that does not provide any express remedy or treble damages provision. *Id.* If the foreign jurisdiction lacks subject-matter jurisdiction over a claim that

does not automatically render it an inadequate forum, but it strongly weighs against *FNC* dismissal. *See Norex*, 416 F.3d at 158 (requiring defendants to establish that the proposed alternative forum "provide[s] alternative legal actions to address the wrongdoing encompassed by civil RICO").

Switzerland does not have a Rule 23 class action procedure. This "class action" would not be "accepted" as filed. It would be dismissed *sua sponte/ex-officio*. Perucchi ¶¶ 96–107.[45]

3. Switzerland's Lack of the Jury Trial Guaranteed Plaintiffs by the U.S. Constitution Further Renders a Swiss Forum Inadequate

"[T]he Seventh Amendment right to a jury is fundamental." *Nat'l Equip. Rental, Ltd. v. Hendrix*, 565 F.2d 255, 258 (2d Cir. 1977). A US citizen's right to a jury trial is a right of constitutional significance — not a procedural nicety. *See Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393 (1937). Here, Plaintiffs have made a demand for jury trial. Yet no jury trial is available in Switzerland. Perucchi ¶ 111. An *FNC* dismissal would effectively deprive Plaintiffs' constitutional right to a jury trial.

This deprivation alone renders Switzerland an inadequate forum. This is so because the Supreme Court has admonished that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care. *Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 564–65 (1990). *FNC* is a common-law rule designed to promote efficiency and provide convenience for the parties. Such a procedural rule cannot trump a fundamental constitutional right where, as here,

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[45] In *In re Lernout & Hauspie Sec. Litig.*, 230 F. Supp. 2d 152 (D. Mass. 2002), for example, was a securities class action involving a Belgium corporation and KPMG entities. All directors/officers resided in Belgium, where the alleged wrongdoing took place. KPMG Belgium sought an *FNC* dismissal. The court denied the motion because Belgium was not an adequate alternative forum due to the absence of any Rule 23 class action procedures. *FNC* dismissal would "force thousands" of US class members to file separate actions in Belgium — making the remedy "so clearly inadequate or unsatisfactory that it is no remedy at all." *In re Poseidon Concepts Sec. Litig.*, 2016 U.S. Dist. LEXIS 68127 (S.D.N.Y. May 24, 2016), involved a securities class action against a Canadian corporation and its auditor — a Canadian KPMG entity. Poseidon did business in the U.S. Its stock traded on the Toronto Exchange. KPMG sought an *FNC* dismissal, which was denied. The Florida resident class plaintiff's selection of the SDNY forum was "entitled to significant deference" despite the existence of other securities class actions in Canada. The SDNY forum was not selected for any improper purpose by a U.S. resident as "securities litigation is regularly conducted in here" — "the nation's financial center [where] its courts are well versed in suits of this nature." *Id.* at *26.

"the federal policy favoring jury decisions of disputed fact questions" mandates that "any doubts [be resolved] in favor of the right to a jury trial." *Lee Pharms. v. Mishler*, 526 F.2d 1115, 1117 (2d Cir. 1975) (cleaned up).[46]

C. The Public and Private Factors Favor the New York Forum

After the "presently available" and "adequate" alternative forum issues have been resolved, the court "balance[s] a series of factors involving the private interests of the parties in maintaining the litigation in the competing fora and any public interests at stake." *Wiwa*, 226 F.3d 88 at 100. All these secondary factors, save applying Swiss law to the claims, weigh against granting the motion.

1. Access to Evidence — "View of Premises" — Favors New York

Most of the Individual Defendants are in NY, available to testify. Reams of evidence are in the Credit Suisse, KPMG, PwC and merger lawyers'/bankers' and the Individual Defendants' files here. The files of regulators/prosecutors in proceedings involving Credit Suisse and KPMG are in the SDNY, EDNY, EDVA and DC. The files of PwC — the successor auditor — and those of NY-based lawyers and investment banks that helped put the UBS/Credit Suisse merger together are in NY. ¶ 151. A jury trial here, with live witnesses, one of the prime goals of an *FNC* resolution, will be expeditious and inexpensive, at least in a relative sense.

If the defense tries to minimize the Credit Suisse/KPMG's NY presence/involvement, a "view" of the Credit Suisse and KPMG NY skyscraper operations may be helpful to refute such specious claims. And to the extent there is any local interest in avoiding imposing on jurors to decide cases not impacting their community, ***this is an NY case*** involving a big NY bank, big NY accounting firm, thousands of NY employees and thousands of NY shareholder victims who owned some of the 540+ million Credit Suisse shares in the US.

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[46] Some cases hold that unavailability of a jury trial does not render a foreign forum inadequate. *See ACLI Int'l Commodity Serv., Inc. v. Banque Populaire Suisse*, 652 F. Supp. 1289, 1295–96 (S.D.N.Y. 1987). But these cases do not analyze the jury-trial issue on constitutional grounds.

The entity defendants have their principal places of business in, and are citizens of, NY. 90% of the Individual Defendants are U.S. citizens, residing in NY. ¶¶ 1, 80, 83, 87–115, 119, 151–155. Credit Suisse occupies an office tower at 11 Madison Avenue in Manhattan, its US/Americas headquarters, with over 10,000 employees. ¶¶ 80–84. NY was the headquarters of Credit Suisse's US/Americas operations. It owns billions in assets in NY. It and its securities are registered with the SEC. Billions of its securities were listed on the NYSE, where Plaintiffs acquired their Credit Suisse shares. ¶ 8. CSGAG and its US subsidiaries are subject to US/NY banking laws, and are regulated by the US Fed, Treasury, SEC, FDIC, FINRA, and the NYSDFS and NYAG. ¶ 8.

Little discovery in Switzerland will be necessary. *Id.* However, if Swiss evidence is needed, it will not be difficult to obtain. Perucchi ¶¶ 118–120. The evidence and live witnesses needed to have a jury trial are here in NY. There are 45 Defendants (¶¶ 152–155):

- The four Credit Suisse Entity Defendants, all are Delaware companies headquartered in and citizens of New York.
- Of the 29 Credit Suisse Individual Defendants, 23 are U.S. citizens, most NY-domiciled. Of the remaining six Credit Suisse individual defendants, four are Swiss, one English, one Singaporian. Each of them held top Credit Suisse positions and were frequently present in Credit Suisse's NY headquarters.
- KPMG LLP is NY-headquartered, and a citizen of NY. All 11 KPMG individual defendants are U.S. citizens, most NY-domiciled, all working out of the NY offices.

[The remainder of this page is deliberately left blank.]

Defendant	Citizenship/Residence - Principal Place of Business
Credit Suisse Holdings (USA) Inc.	NY/NY
Credit Suisse MGMT LLC	NY/NY
Credit Suisse Securities LLC (USA)	NY/NY
Credit Suisse Capital LLC	NY/NY
Doyle	US/NY
Thornburgh	NY/FL-NY
Macia	US/NY
Klein	US/NY
Bianchi	US/NY
Ribeiro	US/FL
Rohner	Switzerland/Switzerland
Tiner	UK
Schwan	Switzerland
Bohnet	Switzerland/MA
Nargolwala	Singapore
Mathers	US/NY
Hudson	US/NY
Amine	US/NY
O'Hara	US/NY
Shafir	US/NY
Warner	US/NY

Defendant	Citizenship/Residence - Principal Place of Business
Brady	US/NY
Jain	US/NY
Vasan	US/NY
Dougan	US/NY
Varvel	US/NY
Popp	US/NY
Chin	US/NY
Kim	US/NY
Sohn	US/NY
Miller	US/CT
Cerutti	Italy-Switzerland
KPMG LLP	US/NY
Wada	US/NY
Thomas	US/NY
Knopp	US/NY
Newinski	US/NY
Bradley	US/NY
Veihmeyer	US/NY
Marcello	US/NY
Whittle	US/NY
Middendorf	US/NY
Sweet	US/NY
Holder	US/NY
Hudson	US/NY
Thomas-Graham	US/NY

a. The Credit Suisse Defendants Were Present in New York, and Their Wrongdoing Occurred in New York

Credit Suisse's NY operations were part of an "integrated global entity," *i.e.*, "[***w*]*e operate as an integrated bank***," a "global entity." ¶¶ 82, 158, 166.

> Our banking operations are subject to extensive federal and state regulation and supervision in the U.S.
>
> ***
>
> Our New York Branch is licensed by the [NYDFS] … examined by [it], and subject to laws and regulations applicable to a foreign bank operating a New York branch.

> … [T]he Superintendent [can] seize our New York branch and all Credit Suisse business and property in New York State … under circumstances generally including violations of law, unsafe or unsound practices ….
>
> Our operations are also subject to reporting and examination requirements under U.S. federal banking laws …. The New York Branch is also subject to examination by the Fed in its capacity as our U.S. umbrella supervisor ….

Credit Suisse was subjected to repeated US/NY regulatory/criminal proceedings. Credit Suisse has sued as plaintiff in NY courts at least five times. ¶ 156. Credit Suisse has been sued at least seven times in securities class actions in the SDNY, settling four cases for over some $200 million.[47] It also paid billions to settle class action suits in the EDNY for stealing accounts of Holocaust victims, which went "dormant" after their owners had been murdered.[48] In these instances, Credit Suisse invoked the jurisdiction of courts in NY for its benefit. ¶¶ 20(a)–(e),156, 169–172, 174–175.

The U.S. suits arising from the Credit Suisse scandal have coalesced in the SDNY. Securities-fraud class actions for U.S. ***purchasers*** (not holders) of Credit Suisse's common shares under the US securities laws (not Swiss law or RICO) during 2022–2023 and a class action involving $16 billion in AT1 bonds (under Swiss law) are before this Court. Other suits may be on the way. It has been reported that Quinn Emanuel is preparing to sue Switzerland here in the SDNY on behalf of AT1 bondholders, for whom it has been pursuing administrative remedies in Switzerland. *Credit Suisse Bond*

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[47] Credit Suisse recently settled an antitrust SDNY class action for $74 million, arising out of some of the decades of misconduct alleged in this case. *Fund Liquidation Holdings LLC v. Credit Suisse Grp. AG*, Case No. 1:15-cv-0871 (SHS).

[48] Credit Suisse long exploited Swiss banking "secrecy" laws to become a haven for deposits from all over the world, monies from those seeking secrecy and often to avoid paying taxes — hence the negative connotation of the term "Swiss bank account."

Many of those secret accountholders were corrupt individuals trying to hide the fruits of their illegal behavior or theft, from officials of the Nazi regime in Germany who sought to hide plundered assets in secret Credit Suisse accounts to post WWII dictators, drug and arms dealers and other miscreants who did the same with the fruits of their illegal conduct. ¶¶ 174–175.

This despicable conduct, like the tax evasion, never stopped. Charlie Savage, *Beleaguered Swiss Bank Accused of Impeding Hunt for Accounts Linked to Nazi's*, THE N.Y. TIMES, Apr. 18, 2023.

Investors Plot Lawsuits Against Switzerland, REUTERS, Sept. 15, 2023. *Credit Suisse Investors Plot to Sue Switzerland*, FINEWS.COM, Sept. 18, 2023. UBS recently disclosed that "U.S. authorities are seeking evidence … to assess whether [Credit Suisse] mislead investors about its financial health." Stefania Spezzati, *U.S. Authorities Scrutinize If Credit Suisse Mislead Investors Before Rescue Filing*, REUTERS, Sept. 19, 2023. Likely the DOJ is not far behind. The investigations, proceedings and litigations arising from the largest financial scandal of this century, involving enterprises, actors and conduct centered in NY, are coalescing in the US and the SDNY.

Investors in Indonesia and Singapore are going to sue as well. Deviana Chuo, *Singapore Investors Retain Law Firm for Credit Suisse AT1 Claims*, FINEWS, Aug. 30, 2023; *Singapore Court Order Credit Suisse to pay Georgia Ex-PM $734 Million*, BARRONS, Sept. 19, 2023. To ensure accountability for those who ran an international bank to the ground, and to compensate the shareholder victims of this incredible misconduct, each nation's legal system will have to provide remedies for their citizens as best they can, because there is no remedy in Switzerland.

These various claims are different factually and legally, requiring individual treatment. For instance, the AT1 bondholder claims are different than Plaintiffs' shareholder claims. Unlike Credit Suisse's common stock, the AT1 bonds were not registered with the SEC and not listed on any US exchange. And unlike Plaintiffs here, the AT1 bondholder plaintiffs are not domestic. And the AT1 bondholders were speculative high interest rate securities purchased by sophisticated investors. The AT1 bonds could be written down to zero, if the Swiss government had to provide extraordinary liquidity support to Credit Suisse. It did and they were. These facts distinguish any AT1 bond case from these common stockholder claims under both US and Swiss law.

b. The KPMG Defendants Were Present in New York, and Their Wrongdoing Occurred in New York

In August 2022, "KPMG LLP, the U.S. audit, tax and advisory firm announced plans to relocate its headquarters to Two Manhattan West" (¶ 120):

> "KPMG has been based in New York since our inception on August 2, 1897, and we are proud to show our continuing commitment to this great city with our exciting new headquarters … said Paul Knopp, KPMG U.S. Chair and CEO.
>
> "This exciting new building is emblematic of our dedication to New York, and it embodies our New York spirit and the forward momentum of our people as we serve clients in the New York metro area well into the future."

KPMG employs 5,000 professionals in NY. Top KPMG partners in NY were involved in both auditing and mismanaging Credit Suisse for decades. NY is where the CEOs of ***both*** KPMG International and KPMG LLP work and live. KPMG's "steal the list" criminal scandal took place in NY. The audit work papers they destroyed/altered are here. KPMG was fined $50 million here while six individuals were criminally convicted in the SDNY. ¶¶ 119–133.

c. Credit Suisse Has Consented to Jurisdiction and Venue in New York and the U.S.

CPLR 327(b) and GOL § 5-1402 prohibit courts from dismissing a suit on *FNC* grounds, where the suit arises out of or relates to an agreement providing for consent to the application of NY law and jurisdiction.[49] Consents to NY/US venue/jurisdiction exist in several agreements, all related to the allegations of wrongdoing. ¶¶ 179–183.

- 2016 Deposit Agreement with BNY Mellon for Credit Suisse's American Depositary Shares states it "consents and submits to the jurisdiction of any state or federal court in the State of New York".

- 2014 Settlement Agreement, where Credit Suisse paid $885 million in *Federal Housing Finance Agency v. Ally Financial Inc.*, No. 652441/2011 (N.Y. Sup. Ct. N.Y. Cnty.), agreeing to "submit to the personal jurisdiction of the [S.D.N.Y.].

- 2016/2018 Settlement Agreements with the NYAG to pay $5 million for "dark pool" misconduct in which it "irrevocably and unconditionally waiv[ed] any objection based upon personal jurisdiction, inconvenient forum or venue."[50]

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[49] These statutes reflect NY's public policy. *See Lumbermens Mut. Cas. Co. v. Commonwealth of Pa.*, 52 A.D.3d 212, 212 (1st Dep't 2008).

[50] The BNY Mellon agreement permitted the listing of Credit Suisse's common stock on the NYSE, the shares Plaintiffs owned. ¶¶ 8, 160. CSGAG consents and submits to the jurisdiction of any state and federal court in NY. ¶ 160.

Whether these agreements prevent this Court from granting an *FNC* motion as would be the case with a state court is uncertain. *See Borden, Inc. v. Meiji Milk Prods. Co.*, 919 F.2d 822, 827 (2d Cir. 1990) (declining to decide whether CPLR 327(b) is binding on a federal court); *but see Koster*, 330 U.S. at 529 ("Since this case is pending in NY and is a diversity case, it is appropriate to observe that the law of NY, if applicable, is to the same effect as to the considerations to govern [*FNC*] questions in this class of cases."). But binding or not, they are "forum facts" that belie any claims of inconvenience.

2. Application of Swiss Law Does Not Require a Swiss Forum

The only factor that favors dismissal is the need to apply Swiss law to some, or even all of the claims were the RICO claims dismissed. But the need to apply foreign law is actually entitled to very little weight in the *FNC* equation. The Second Circuit has cautioned "against an excessive reluctance to undertake the task of deciding foreign law, a chore federal courts must often perform." *Manu Int'l, S.A. v. Avon Prods., Inc.*, 641 F.2d 62, 68 (2d Cir. 1981)*; see also Boosey & Hawkes Music Publishers, Ltd. v. Walt Disney Co.*, 145 F.3d 481, 492 (2d Cir. 1998) ("reluctance to apply foreign law … standing alone … does not justify dismissal"). As Your Honor has stated "This court has applied the law of many foreign jurisdictions when required to do so, and the task would be far from impossible here." *See Ramirez, Inc.*, 448 F. Supp. 2d at 531.

Applying Swiss law here in the familiar procedural context of a Rule 23 class action imposes no difficulty. The Swiss statutes involved are straightforward. Other than Grolimund's refusal to acknowledge the statutory provisions' mandate, there is no dispute over their language. They are available in English.[51] They involve concepts of due care, good faith, joint and several liability, as well

[51] No expert testimony is needed. U.S. judges read and understand English. The language of these statutes is clear. *Bodum USA, Inc. v. La Cafetiere, Inc.*, 621 F.3d 624, 629 (7th Cir. 2010) ("Because objective, English-language descriptions of French law are readily available, we prefer them to the parties' [expert] declarations."). We urge the court to eschew reliance on the highly paid "experts" offered up by Defendants. Unlike Dr. Perucchi, these are not practitioners with real-world experience and actual firsthand knowledge of what is going on in Switzerland. In any event, if the Court finds the competing declarations offset each other, it should rely on the clear text of the Swiss statutes.

as conspiracy and secondary liability concepts frequently applied by U.S. courts.

3. Related Proceedings in Switzerland and the Related Litigations in New York Support Denial of the *Forum Non Conveniens* Motion

The Swiss Parliament is conducting an inquiry into this scandal, but it will only go back to 2015, ***will not assess the bank's management*** and will be conducted via "***highly secret procedures***." *Swiss Post Mortem of Credit Suisse Crisis to Go Back to 2015*, REUTERS, Sept. 8, 2023. But, ***whatever goes on in Switzerland, the results are to be sealed for 50 years***.[52]

The Swiss forum, *i.e.*, government, is not the typical disinterested sovereign merely providing a legal system for dispute resolution between private parties. The Swiss government had regulatory oversight of Credit Suisse. The Swiss government is potentially liable. Christiaan Hetzner, *Credit Suisse Received a Clean Bill of Health from Regulators — Then Took Less Than a Week to Completely Collapse*, FORTUNE, Mar. 20, 2023 ("Yet astonishingly, regulators at … Finma — almost up to the very end — gave the lender a clean bill of health"). The Swiss government and its agencies are involved as parties in the legal proceedings in Switzerland, where their conduct is being challenged and their potential liability is being disputed. The Swiss government has a direct economic interest in seeing these claims not prosecuted as it could end up paying all or part of the bill. ¶ 199. This is an unusual situation and cuts against transfer.

D. Even If the RICO Claims Are Dismissed, the *Forum Non Conveniens* Motion Should Be Denied

Sustaining the RICO claims virtually mandates a US forum. *See*, *e.g.*, *Giuliano v. Omni Hybrid Holdings, LLC*, 2021 U.S. Dist. LEXIS 259651, at *22 (E.D.N.Y. June 22, 2021) (denying an *FNC* motion because defendants failed to "establish that [the proposed alternative forum] … recognizes causes of action that address the wrongdoing encompassed by civil RICO"). However, the absence of a RICO claim is not decisive on the *FNC* motion. NY federal courts frequently hear cases involving

[52] John Revill, *Credit Suisse Inquiry Will Keep Files Secret for 50 Years*, REUTERS, July 16, 2023.

only foreign law claims. Plaintiffs believe the RICO claims are well pleaded. But assume they are not and this case became solely a Swiss law case. This case is still in a proper forum, due substantial deference and Defendants have still not carried their burden of proof to demonstrate that Switzerland is a "presently available" and "adequate" alternative, where all the defendants can be sued in Switzerland or that defending the case here amounts to "vexation and hardship out of all proportion to the plaintiffs' convenience" in suing here.

IV. Personal Jurisdiction over All Defendants Has Been Adequately Pleaded

Personal jurisdiction is pleaded generally as to all the individual defendants (¶ 146) with additional jurisdictional facts pleaded to each of them at ¶¶ 85–115, 124–125, 127–133, 147. Given the discovery stay, it is improper for Defendants to deny personal jurisdiction and then argue facts that contradict the allegations. *See Dorchester Fin. Sec., Inc. v. Banco BRJ, S.A.*, 722 F.3d 81, 84 (2d Cir. 2013) (*per curiam*) (court may permit discovery in aid of Rule 12(b)(2) motion). This is a Rule 12(b)(6) motion. There will be time to evaluate Defendants' denials and factual claims later — after discovery. At a minimum, such factual assertions must be made by parties on personal knowledge. No individual Defendant has submitted a declaration as to anything. Yet they serve up a declaration of Joan Elizabeth Belzer, which claims — based on her review of corporate records — that Dougan was not "***based in*** Credit Suisse's NY office" as CSGAG CEO and Director. But the Complaint alleges Dougan was CSGAG's CEO — the worldwide CEO — resident in NY and "performed his duties out of the NY offices" and "operated out of [the] NY headquarters since 2007," and "operating out" of Credit Suisse's NY office for years as it became a cesspool of criminality. ¶¶ 108, 362. Hearsay factual assertions in briefs and third-party declarations as to where Defendants lived or worked or what a review of corporate records shows, or who did what are improper at this stage.[53] Either there

[53] In any event, given KPMG's and Credit Suisse's massive NY operations, where these Defendants worked (¶¶ 85–116, 146–147), for personal jurisdiction or *FNC* purposes it matters not

should be discovery or these assertions set aside and the allegations accepted as controlling.

V. Defendants Violated Their Duties Under Swiss Law and Are Jointly and Severally Liable for the Damage Caused Credit Suisse Shareholders

To state a negligence-based claim, such as a claim under the Swiss CO, Rule 8(a) requires only that Plaintiffs allege a "short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a)(2). To satisfy this rule, "detailed factual allegations" are unnecessary. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). To survive a motion under Rule 12(b)(6), Plaintiffs need only allege "sufficient factual matter … to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009) (quoting *Twombly*, 550 U.S. at 570). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

Tested against these rules, the Complaint sufficiently alleges Plaintiffs' Swiss-law claims.

A. The Complaint Adequately Pleads Defendants' Negligence, Lack of Good Faith, and Liability for Losses/Damages to Shareholders Under Swiss Law

An effective Internal Control system protects shareholders from losses/damage, and provides assurance of legal compliance, minimizing the risk of losses due to fraud/criminal conduct. It is the responsibility of the Directors/Executives and the external auditor to use due care and diligence in assuring that Credit Suisse had an adequate system of Internal Controls, operating in a culture of compliance. ¶¶ 214–217. A lack of sufficient Internal Controls is *per se* mismanagement.

B. The Swiss Code of Obligations and Credit Suisse's Own Conduct Code Impose Specific Duties on the Directors, Executives, External Auditor and Third Parties Working with Them

Swiss statutes impose specific duties on Directors/Executives with respect to Internal Controls — "inalienable duties" for "overall management of the company," including the "accounting and financial control systems as required for management of the company," in particular with regard

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whether some third party thinks any Defendant now resides outside NY. Any claims of lack of personal jurisdiction are specious.

to compliance with the law." CO Art. 716a. They and "third parties "engaged in the management" of the Company's business must perform their duties with "all due diligence." CO Art. 717; Perucchi ¶¶ 46–50.

The "members of the Board" and "all persons engaged in the management … of the company are [jointly and severally] liable to … the individual shareholders … for all losses or damage arising from a … negligent violation of their duties," and "all persons engaged in auditing the [accounts] are liable both to the company and the individual shareholders [for any losses/damages] arising from … [any] negligent breach of duty." CO Arts. 754–755. The American "business judgment rule" does not exist under Swiss law. Perucchi ¶¶ 46–50. In addition, all persons "engaged in auditing the company" are directly and jointly and severally liable to the individual shareholders for the losses arising from any negligent breach of their duties. These statutes reach beyond the Directors and Executives and statutory Auditor to reach individuals and entities working with them in the performance of their duties. *Id.*; CO Arts. 754, 759.[54]

Credit Suisse's Internal Governance Rules and Conduct Code also required due care, diligence and good faith honest conduct. The Conduct Code stated (¶¶ 28, 220):

- "All members of the Board and employees are expected to comply with applicable laws, regulations and policies." "Only by operating within this framework can we maintain and strengthen our reputation for integrity, fair dealing and measured risk trading."
- "We strive to maintain an exemplary control and compliance culture … by setting the right tone for compliance with applicable laws, regulations and policies." "We act at all times according to the standards outlined in the [Conduct Code]."
- "We do everything possible to prevent money laundering, the financing of terrorist activities or corruption."

[54] CO Art. 55 imposes liability against any employer (like the Credit Suisse Entity Defendants and KPMG), whose employees participated in violation of these duties. The employer bears the burden of proving the damage would have occurred regardless of its due care. CO Art. 55.

- "We maintain the highest standards in our cross-border business activities" and "are committed to complying with all relevant tax laws" and "do not assist clients in activities intended to breach their tax obligations."

Auditing Credit Suisse's Internal Controls to assure compliance with its Conduct Code was part of KPMG's obligations. The deficient Internal Controls were never fixed; the Conduct Code was never properly audited or enforced. ¶ 221. The Credit Suisse Individual Defendants and KPMG Defendants were involved in the mismanagement of Credit Suisse. Had they discharged their duties, they could have prevented the damage caused to the shareholders. ¶¶ 219–222.

> The Board assumes oversight responsibility for establishing appropriate governance for Group subsidiaries. The governance of the Group is based on the principles of an integrated oversight and management structure with global scope, which enables management of the Group as one economic unit.
>
> ***
>
> The Group has a comprehensive management information system (MIS) in place as part of our efforts to ensure the Board and senior management are provided with the necessary information and reports to carry out their respective oversight and management responsibilities.

The Directors/Executives had committees to assure proper supervision, *i.e.*, Governance, Audit, Compensation, Conduct and Financial Crime Control and Risk Committees to:

- monitor the adequacy of the financial accounting and reporting and the effectiveness of internal controls to ensure compliance by the Group with legal and regulatory requirements;

- monitor the adequacy of the management of operational risks including the effectiveness of internal controls that go beyond the area of financial reporting;

- monitor and assess the effectiveness of financial crime compliance programs, including those with respect to anti-money laundering, anti-bribery, anti-corruption and client tax compliance; and

- assist the Board in fulfilling its oversight duties with respect to the Group's exposure to financial crime risk, tasked with monitoring and assessing the effectiveness of financial crime compliance programs and, assessing the Group's overall compliance for financial crime risk. (¶ 223.)

The Director'/Executives' acts of negligence, including retaining KPMG as auditor in light of KPMG's sordid history of complicity in other financial frauds, which were known to them, are at ¶¶ 7,

347–349. Inside Credit Suisse, specific warnings were continually turned aside. Take Greensill and Archegos. ("Warnings were repeatedly dismissed by the bank's leadership … why were those raising red flags ignored or marginalized?") How about the Tuna Boat/Bonds scandal and becoming involved with the know "***master of kickbacks***" and ending up taking a plea and paying $547 million. ¶ 355. In due course, disaster ensued. Credit Suisse suffered $35 billion in fines/losses. Each individual common shareholder in the class was ***separately damaged*** as the stock fell from $34 to $2 during the class period, a decline "arising out of" Defendants' breaches of duties. ¶ 356.

C. Credit Suisse's Directors Failed to Discipline Wrongdoing While Rewarding Wrongdoers, Including Themselves

Top Credit Suisse insiders pocketed over $32 billion between 2013–2023 while Credit Suisse lost $3 billion. They also had a secret "skinning" operation that took for themselves "sure thing" economic opportunities in the course of their employment. There was a secret, unreported bonus pool for them, including defendants Varvel, Popp, Jain, Chin, Shafir, Kim and Sohn. ¶¶ 12, 377.

Credit Suisse's Directors were to use their power over compensation to control subordinates, including "clawing back" prior compensation, in the event that the individual participated in or was responsible for conduct which resulted in losses, failed to meet standards of honesty, integrity, competence, capability and financial soundness. ¶¶ 378–382.

> Risk and control considerations are an integral part of the performance assessment and compensation processes. This ensures that the Group's approach to compensation includes a focus on risk and internal control matters and discourages excessive risk taking. In order to align profitability and risk when determining annual performance objectives and results, all employees are assessed on a set of business conduct behaviors that include adherence to the [Conduct Code]…. [¶ 378.]

None of the billions obtained by miscreant Credit Suisse officials was ever recaptured. Had such action been taken, it would have disrupted the course of conduct/conspiracy. ¶ 380.

Credit Suisse Directors kept "rouge" employees on the payroll, paid their legal fees and allowed them to keep unearned bonuses gained by misconduct. This was part of mismanagement and

acts of bad-faith and breach of duties, taken by the Directors/Executives and to secure the cooperation/silence of these lower-level actors, so they would not turn on the Directors/Executives. US/NY officials forced Credit Suisse to fire these actors. ¶¶ 345–346. Rohner, Tiner and Schwann also sought to absolve themselves and protect and pay off Dougan, their longtime pal and CSGAG CEO operating out of New York headquarters and his accomplices. ¶¶ 361–376

CEO Dougan and others in NY were in a position to implicate Rohner, Nargolwala and other longtime Directors, like Tiner, Schwan and Bohnet, in the wrongdoing. Indeed, Rohner had been General Counsel and COO, when Dougan was running the worldwide show. ¶ 93. In 2014, even after the toxic securities scandal, $2.3 billion tax fine and tongue lashing by the DOJ, Dougan had to go. So, in Oct. 2015, when Dougan left, Rohner and the Board heaped praise on him.

> "We are extremely grateful to Brady Dougan for his exceptional commitment, unparalleled personal contribution and leadership to Credit Suisse over many years. Brady has significantly and successfully shaped our company; he has kept our bank on track in recent years despite a complex environment and considerable headwinds in the global financial services industry. Brady and his management team have mastered even the most difficult challenges together."
>
> Urs Rohner said: "I wish to thank Brady for his remarkable commitment to the bank and exceptional record of achievements over the past 25 years."
>
> ***
>
> Brady significantly and successfully shaped Credit Suisse… The Board of Directors, the Executive Board … are extremely grateful to Brady for his …. unparalleled contribution …. [¶¶ 374–375.]

Schwan, the Board's Vice Chair and Lead Independent Director, in turn, absolved Rohner of any blame or fault, then Rohner chimed in "[p]ersonally, our hands are clean." ¶ 373.

Thus, to secure Dougan's silence, cooperation and support going forward, the Directors permitted him to keep over $200 million in bonus compensation despite misconduct that had cost Credit Suisse billions and led to criminal convictions and driven the stock price lower. The board member who oversaw the payment said … "[t]hat was certainly a mistake …." ¶¶ 363–364.

But Dougan was not a lone wolf. His top aides O'Hara, Shafir, Brady, Jain and Vasan left,

were allowed to keep hundreds of millions they pocketed due to the illegal conduct. This payoff practice was routine, with the Board improperly mismanaging corporate assets, to allow payments to exiting executives, to procure their silence and cooperation. ¶¶ 366–370.

Other high-ranking officials bear responsibility. Cerutti, was Credit Suisse's general counsel between 2009 and 2022. Warner was the top risk officer for years and a Credit Suisse insider since 2002. Mathers was Credit Suisse's CFO from 2010–2022. Hudson, the Chief Compliance Officer for years, had been a Credit Suisse executive since 2008. These individuals were involved in scandal after scandal, pocketed millions, yet nothing happened to them, permitting the illegal course of conduct and conspiracy to continue. *Id.*

D. KPMG Violated Its Statutory Duties Under Swiss Law

There are multiple paths to KPMG liability under Swiss law. KPMG's pleaded misconduct renders them jointly and severally liable (CO Arts. 50 and 759) under CO Art. 754 (participating in mismanagement) and Art. 755 (negligent violation of own audit duties) for damage or loss to individual shareholders (Class Members) and acting as an instigator, perpetrator and accomplice, as well as an employer responsible for damage caused by its employees (CO Arts. 41, 50, 55). ¶¶ 5–7, 177–178, 221, 404–424, 442; Perucchi ¶¶ 17–19, 21–25, 28–30, 32, 35–39.

VI. Defendants' Affirmative Defenses of "Discharge," "Release" and "Share Registration" Are Inapplicable to the Direct Damage Claims and Are Fact-Based and Premature, as Is the Claim That a Prior Settlement Bars This Case

As part of Defendants derivative case gambit, they offer up factually based affirmative defenses that apply only to derivative suits under CO Art. 756, and not to these claims under CO 716a, 754, 755, 759, 41, 50, 55, let alone RICO. Anticipating Defendants might try to misuse the "release"/"discharge" provisions in the CO, the prior settlement of an unrelated class action or a

"share registration" requirement, Plaintiffs proactively pleaded around them. ¶¶ 383–385.[55] Perucchi summarily dispatches those purported Swiss-law defenses. Perucchi ¶¶ 51–52, 55–58.

"Discharge" is nothing more than the affirmative dense of release. Under Swiss law, a "resolution of release passed by the general meeting of shareholders is effective only for facts that have been disclosed." CO Art. 758. Disclosure is not presumed. Defendants bear the burden of demonstrating effective disclosure for each wrongful act for which they assert release as a defense. As demonstrated in Credits Suisse's annual meeting packages, no facts or explanations regarding the discharge were ever disclosed. Perucchi ¶¶ 55–58; Chang Exs. 1, 2.

Credit Suisse Directors each year proposed the shareholders vote to "discharge" them for the prior "financial year." No shareholder vote discharging Credit Suisse's Directors/Executives in any of the prior "financial years" relevant to this case was effective or valid, nor can "discharge" apply to direct damage claims by shareholders as opposed to CO Art. 756 claim for the corporation not asserted here. ¶¶ 383–385; Perucchi ¶¶ 55–58.

"Discharge" under CO Ars. 756–768 is contained in "Liability — Damages to the Company," which covers only derivative actions. Claims under CO Arts. 754 and 755 are not covered by the discharge provisions. The claims under CO Arts. 754 and 755 claims can be asserted by and for ***former*** shareholders. Perucchi ¶ 27. In any event, the defense of discharge must fail at the pleadings stage. The Complaint alleges a lack of disclosure necessary for a discharge vote to be effective. ¶¶ 383–385; Perucchi ¶¶ 55–58.

In each of the relevant years, the "Invitation to the Annual General Meeting of Shareholders contained an Agenda item" Discharge of the Members of the Board of Directors and Executive Board

[55] This case is not barred by a prior class action settlement. That is another fact-based affirmative defense. The Complaint expressly pleads that that settlement was infirm and ineffective as to any of the claims asserted here. ¶ 204.

a "Motion Proposed by the Board of Directors" which said, "The Board of Directors proposes that the Members of the Board of Directors and the Executive Board during the [year] financial year be discharged." Unlike every other motion proposed by the Board which was accompanied by a narrative "Explanation by the Board of Directors," detailing the reasons for the motion and its impact if adopted, nothing more was said. At each annual meeting the Chairman — almost always Defendant Rohner — called the Discharge Motion for the Board. In 2022 when the discharge petition was actually debated in the context of Greensill and Archegos scandals, the shareholders voted against the discharge! The Credit Suisse directors were going to try to get the shareholders vote to discharge for conduct during the 2022 year, but because of shareholder protests and outrage, this proposal was withdrawn. ¶¶ 383–385.

Defendants also claim that Swiss law limits standing to persons listed in the Bank's "Share Register." There is no such requirement to bring these types of direct damage claims. CO Art. 685f states that "[w]here listed registered shares are acquired on a stock exchange, the attendant rights pass to the acquirer on transfer." Credit Suisse shares are registered shares listed on an exchange. The right to sue under CO Arts. 754 and 755 is one of those "attendant rights" referred to in Art. 685f. Inclusion in the "Share Register" is not a requirement. Credit Suisse itself has acknowledged, many of its shares are held by "nominee[s]." Holding shares through a nominee is proper and it does not deprive a shareholder of the right to sue for losses or damages. Perucchi ¶¶ 53–55.

VII. The Claims Cannot Be Dismissed on Defendants' Affirmative Defense Based on Any Statute of Limitation at the Pleadings Stage

Plaintiffs plead to recover all of the damages/losses to the Class Members' property, *i.e.*, Credit Suisse shares, during the 10-year Class Period. None of the claims are barred by the statute of limitations. ¶¶ 385–397. As confirmed by Perucchi, the 10+ year Swiss statute of limitations applies here. Perucchi ¶¶ 100–119. As Plaintiffs allege, the underlying misconduct did not "***cease***" until 2023. ¶¶ 386–397. All of Plaintiffs' claims are timely.

The Complaint pleads continuing course of wrongdoing and conspiracy from 2013 well into 2021, continuing damage, while accompanied by specific false statements in Annual Reports including continued reassurances by the Credit Suisse Directors/Executives that all was well and that what wasn't had been or was being fixed, including repeated annual assurances by them and repeated annual certifications — every year — by KPMG that Credit Suisse's Internal Controls were functioning and adequate. The misconduct did not cease until March 2023. RCS at 15, 23, 26–27; ¶¶ 404, 442. These allegations raise questions regarding the running of any limitations period.

Defendants' premature limitations claims are undermined by their constant false reassurances to shareholders, which present factual issues. Each year the Credit Suisse Defendants and KPMG jointly communicated with shareholders via the CSGAG Annual Report,[56] which included the annual letters to the shareholders concerning the audit examination of the Credit Suisse financial statements and Internal Controls. ¶¶ 15, 23, 26–27, 386–388, 404, 442; Chang ¶¶ 22–23.

Where, as here, shareholders are assured that issues and problems are being or have been fixed, the enterprise has been successfully restructured and that strong growing profits from legally compliant business practices will follow, they are justified in "sitting tight", not suing the insiders and their assistors for their losses but rather to "***trust***" and "***support***" them as the insiders repeatedly requested they do. Constant and specific, these reassurances were false. Credit Suisse and KPMG certified that the Internal Controls were effective; Credit Suisse assured that it took a "conservative approach," reducing operational risks and "reputational" risks, and was "strengthening control functions" and risk management and control capabilities," and "continuously enhance [its] compliance

[56] Plaintiffs' Swiss law and RICO legal claims are not based on these or other misrepresentations or non-disclosures, neither of which require a purchase of shares or reliance. But they are relevant to ***tolling the running of any statute of limitations***, an affirmative defense that requires a fact-intensive inquiry. The excerpts from the annual reports show that Defendants lulled shareholders with reassurances. This was all part of an effort by Defendants to lull Credit Suisse shareholders into refraining from taking legal action against Defendants. ¶¶ 386–387.

and control framework"; Credit Suisse stated that it "had a very strict compliance and control culture" and "zero tolerance for unethical conduct," and was "positioned to deliver over time compliant, well controlled and profitable growth and returns for shareholders." Chang ¶ 23.

The Complaint was filed in May 2023. Even under the shortest conceivable limitations period (3 years for the Swiss-law claims and 4 years under RICO, without consideration of the ten-year statute or of any tolling, or continuing conduct/conspiracy allegations), billions of dollars of damages are within those shorter periods. And allegations of misconduct — including crimes — that pre-date such limitations periods, are nevertheless relevant. They are background facts. They are also relevant on issues such as notice, knowledge, scienter (RICO), pattern and practice. Also, conduct predating the limitations period can still be RICO predicate acts. *See Bankers Trust*, 859 F.2d at 1105.

In this case, Defendants' course of misconduct and conspiracy and repeated assurances of adequate Internal controls, conversative and compliant business practices and enhanced risk avoidance measures did not cease and were not disavowed until Credit Suisse's March 2023 report of $8 billion in losses and the admission by the Credit Suisse and its new statutory auditor, PwC, that Credit Suisse suffered from "material deficiencies" in its Internal Controls. ¶¶ 386–397.

It is premature to rule on the statute of limitations. Refinement of the ultimate impact of the statute of limitations (and the length of the Class Period), should await class certification and summary judgment proceedings, with a complete factual record, after discovery.

CONCLUSION

For all the reasons set forth above, the Court should deny the motions to dismiss.

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Respectfully submitted,

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