UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re CONVERIUM HOLDING AG SECURITIES LITIGATION	:	No. 04 Civ. 7897 (MBM)
(Meyer v. Converium Holding AG, et al.)	:	
This document relates to: 04 Civ. 8038 04 Civ. 8060 04 Civ. 8295 04 Civ. 8994 04 Civ. 9479	:	

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

WILLKIE FARR & GALLAGHER LLP

787 Seventh Avenue
New York, New York 10019
(212) 728-8000

Attorneys for Defendant Converium Holding AG and the Individual Defendants

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Defendants Converium Holding AG ("Converium" or the "Company") and Dirk Lohmann, Martin Kauer, Richard Smith, Terry G. Clarke, Peter C. Colombo, Georg F. Mehl, Jürgen Förterer, Anton K. Schnyder, Derrell J. Hendrix and George G.C. Parker (collectively, the "Individual Defendants") respectfully submit this memorandum of law in support of their motion pursuant to Rules 12(b)(2) and 12(b)(6) of the Federal Rules of Civil Procedure to dismiss the claims asserted against them in the Consolidated Amended Class Action Complaint (the "Complaint" or "Compl.")[1] on the grounds that it fails to state a claim upon which relief can be granted and the Court lacks personal jurisdiction over defendants Clarke, Colombo, Mehl, Förterer and Schnyder.

PRELIMINARY STATEMENT

Converium is a reinsurance company. In the wake of the Company's announcement on July 20, 2004 that it was increasing reserves substantially and the resulting drop in the price of Converium's stock, the usual bevy of class action lawsuits were filed in this Court accusing the Company and several of the Individual Defendants of fraud in violation of Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act"). Not a single one of those complaints asserted claims under the Securities Act of 1933 (the "Securities Act") challenging disclosures in the Company's December 10, 2001 initial public offering prospectus (the "Prospectus"). Indeed, Plaintiffs in these cases did not assert any Securities Act claims until September 2005 when they filed their Consolidated Amended Complaint. Notwithstanding its 112 pages and 328 numbered paragraphs, the Complaint's claims under the Securities Act, as well as its claims under the Exchange Act, fail to state a claim upon which relief may be granted.

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[1] A copy of the Complaint is annexed as Exhibit 1 to the Affidavit of Kathryn H. Bodkin, Esq., sworn to on December 23, 2005 (the "Bodkin Aff.").

Plaintiffs' belatedly asserted Securities Act claims, predicated on the notion that the Company's reserves at the time of the IPO were deficient by hundreds of millions of dollars, are based on nothing more than preliminary conclusions allegedly reached by Tillinghast Towers-Perrin ("Tillinghast"), an actuarial expert retained to review the Company's pre-IPO reserves. But as Plaintiffs have no choice but to acknowledge, the final conclusions of Tillinghast, reached months later, were far different. Those conclusions demonstrate the reasonableness of the Company's reserves and totally undermine Plaintiffs' fundamental claim that a material misrepresentation occurred. Plaintiffs' claims under Section 12(a)(2) fail for the additional reason that the Complaint does not allege that Converium sold shares to the Plaintiffs or otherwise had a sufficient role in the sales process to allow liability to be imposed under that Section. Finally, even if Plaintiffs stated a claim under Sections 11 or 12 of the Securities Act, those claims would be time-barred because they were not brought within one year of the point in time at which Plaintiffs concede they were on inquiry notice of the facts giving rise to such claims.

Plaintiffs' claims under the Exchange Act fail because the Complaint does not allege that Defendants made any material misrepresentation with the requisite scienter. These claims, too, are based in large part on the preliminary work of Tillinghast prior to the IPO, as well as the preliminary conclusions of another actuarial expert, B&W Deloitte, retained by the Company in 2003. In the case of both experts, their final conclusions, which may be considered on this motion and are the only conclusions that are relevant, completely contradict Plaintiffs' claims. To the extent Plaintiffs base their Exchange Act claims on other alleged indicia of fraud, those matters are not alleged with anything close to the required specificity to create a strong inference of scienter.

Plaintiffs' controlling person claims against various of the Individual Defendants are also insufficient and must be dismissed. The Complaint not only fails to allege underlying violations of the securities laws, but fails to allege culpable participation by any of the Individual Defendants.

Finally, the Complaint fails to allege any basis for this Court to exercise personal jurisdiction over five of the Individual Defendants who reside outside of the United States and whose only alleged involvement was signing or being named as a future director in Converium's Registration Statement.

BACKGROUND

A. The Defendants

1. Converium and Zurich Financial Services

Converium is a Swiss multi-line reinsurance company with its principal place of business in Switzerland. (Compl. ¶¶ 1, 19.) Through its subsidiaries, Converium offers property, casualty and other non-life reinsurance products, as well as life reinsurance products. (Compl. ¶¶ 19, 20.) The Company was created in June 2001 out of the third-party reinsurance business of defendant Zurich Financial Services ("ZFS"), a corporation organized under the laws of Switzerland. (Compl. ¶¶ 21, 68; see Bodkin Aff., Ex. 2 at 160, 173.) Before the initial public offering of Converium shares in December 2001 (the "IPO"), Converium was a wholly-owned subsidiary of ZFS. (Compl. ¶ 21.) In the IPO, ZFS sold its entire stake in the Company. (Id.)

Before the IPO, the third-party reinsurance business of ZFS was operated under the trade name "Zurich Re." (Compl. ¶ 19.) ZFS's reinsurance operations in the United States were conducted through Zurich Reinsurance (North America) Inc. ("ZRNA") and its subsidiary companies, Delaware corporations with regulatory domiciles in New Jersey and Connecticut. (Bodkin Aff., Ex. 2 at 33, 145; Compl. ¶ 19.) In 2001, ZRNA changed its name to Converium

Reinsurance (North America) Inc. ("CRNA") and became an indirect wholly-owned subsidiary of Converium.[2] (Bodkin Aff., Ex. 2 at 7-8.) Converium's non-life reinsurance businesses were organized around three operating segments: CRNA, which managed the Company's non-life reinsurance businesses in the United States and Canada; Converium Zurich, which managed Converium's non-life reinsurance businesses in the United Kingdom, Western and Southern Europe, the Benelux countries, Latin America, the Far East, the Pacific Rim, Israel and Southern Africa; and Converium Cologne, which managed the non-life reinsurance businesses in Germany, Central and Eastern Europe, Northern Europe, Austria, North Africa and the Middle East. (Id. at 2.) Converium Cologne also managed the Company's global life operations and had worldwide underwriting responsibility for accident and health reinsurance with the exception of the United States market, which was written by CRNA. (Id.)

As a reinsurer, Converium provides insurance to insurance companies. (Compl. ¶ 52.)[3] In exchange for premium, these insurance companies—called "cedants" or "ceding companies"—obtain reinsurance protection from Converium through various forms of contracts (or "treaties"), including proportional (quota share) and non-proportional (excess of loss) contracts. (Compl. ¶¶ 52, 53.) Converium's non-life reinsurance business is comprised of both property and liability lines. (Bodkin Aff., Ex. 2 at 81.) Liability business tends to have a longer "tail" than property business (see id.), which means that ultimate losses under such reinsurance contracts are sometimes not known or settled for many years. (See id. at G-3-G-4 (glossary definition of tail).)

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2 The Complaint misleadingly suggests that Converium Holding AG is headquartered in New York and Switzerland. (Compl. ¶ 1.) Converium's headquarters are in Zug, Switzerland. CRNA, Converium's U.S. subsidiary, has offices in New York. (Bodkin Aff., Ex. 2 at 9, 139.)

3 See Cont'l Cas. Co. v. Stronghold Ins. Co., 77 F.3d 16, 20 (2d Cir. 1995) ("reinsurance, after all, is simply insurance for insurance companies"); Travelers Indem. Co. v. Scor Reinsurance Co., 62 F.3d 74, 76 (2d Cir. 1995).

As stated in the Prospectus issued in connection with the IPO, "[l]iability risks are more unpredictable [than other risks] because there tends to be a greater time lag between the occurrence, reporting and payment of claims, and because of the greater diversity of exposures, the challenges in capturing underwriting information, the increased significance of claims handling and the variation in contract terms." (Id. at 81.) And, like other reinsurers, Converium does not separately evaluate each of the individual risks written by its cedants and assumed under its reinsurance treaties; it is therefore "largely dependent on the original underwriting decisions made by ceding companies." (Id. at 14.) Thus, Converium is "subject to the risk that [its] ceding companies may not have adequately evaluated the risks to be reinsured and that the premiums ceded to [it] may not adequately compensate [Converium] for the risks [it] assumes." (Id.)

Reinsurance companies establish loss reserves "to ensure that a sufficient portion of the premiums received in connection with a book of business will be available to cover the claims covered by that book of business." (Comp. ¶ 56.) As the Complaint explains, these reserves "consist of individual case reserves plus Incurred But Not Reported ("IBNR") reserves. A case reserve is established once an insurer has received a claim from the insured party. IBNR reserves are established to pay the expected cost of claims that have not yet been submitted to the insurer, but which the insurer expects to incur." (Id.) The Company establishes IBNR reserves for claims that have not yet been reported, as well as for expected loss development on reported claims. (Bodkin Aff., Ex. 2 at 121.) These reserves include estimated legal and other loss estimation expenses. (Id.)

It is widely recognized that the estimation of loss reserves is "an inherently uncertain process." (Id. at 122.) As the Prospectus noted, "[t]he uncertainty in loss estimation is

particularly pronounced for long-tail lines such as umbrella, general and professional liability and motor liability, where information, such as required medical treatment and costs for bodily injury claims, will only emerge over time." (Id.) The Prospectus further noted that the establishment of reserves is to a large extent a matter of judgment: "Because estimation of loss reserves is an inherently uncertain process, quantitative techniques frequently have to be supplemented by professional and managerial judgment." (Id.)

2. The Individual Defendants

During the period from December 11, 2001 through September 2, 2004 (the "Putative Class Period"), Dirk Lohmann and Martin Kauer served as Converium's Chief Executive Officer and Chief Financial Officer, respectively. (Compl. ¶¶ 22, 23.) Richard Smith was the Chief Executive Officer of CRNA from before the start of the Putative Class Period through September 2003. (Compl. ¶ 24.) Defendants Lohmann, Kauer and Smith are collectively referenced in the Complaint as the "Officer Defendants" and will be so referred to herein. Defendants Terry G. Clarke, Peter C. Colombo, Georg F. Mehl, Jürgen Förterer, Anton K. Schnyder, Derrell J. Hendrix, and George G.C. Parker each served on the Board of Directors of Converium Holding AG during all or some of the Putative Class Period. (Compl. ¶¶ 26-32.)[4] These defendants are referred to herein and in the Complaint as the "Director Defendants."

3. The Underwriter Defendants

UBS AG ("UBS"), acting through its business group UBS Warburg, and Merrill Lynch International ("Merrill Lynch") (collectively, the "Underwriters") served as co-lead underwriters for the Converium IPO. (Compl. ¶¶ 34-35.)

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[4] Mr. Clarke did not become a director of Converium until January 2002. (Compl. ¶ 26.)

B. Converium's Initial Public Offering

On March 22, 2001, ZFS announced its intention to divest substantially all of its third-party reinsurance business historically operated under the "Zurich Re" brand. (Bodkin Aff., Ex. 2 at 160.) According to the Complaint, "ZFS decided that it needed to extricate itself from the increasing liability presented by its reinsurance business." (Compl. ¶ 80.) The reason for demerging the reinsurance business from ZFS's other insurance businesses was no secret. ZFS viewed its third-party reinsurance business as non-strategic and underperforming. (Bodkin Aff., Ex. 3 at 2-3.) In a March 22, 2001 press release appended to its "disappointing" year-end 2000 results, ZFS stated:

> Following a strategic review, Zurich Financial Services has decided to exit the assumed reinsurance business of Zurich Re. The current intention is to accomplish this via a spin-off. Zurich Re, to be renamed, would then become a fully independent, separately listed reinsurer, operating on a global scale. Such a transaction would recognize the interests of Zurich's shareholders, employees and customers. Zurich is planning to dispose of other non-strategic and/or underperforming businesses representing a market value of up to USD 4 billion.

(Id.). ZFS subsequently formed Converium Holding AG, a Swiss company, under which ownership of its third party reinsurance business was consolidated. (Bodkin Aff., Ex. 2 at 160.)

On September 6, 2001, ZFS announced that Converium would be spun-off into a separate legal entity in an initial public offering. (Compl. ¶ 88.) The IPO was structured as a "firm commitment underwriting," by which ZFS sold its shares of Converium to the underwriters, who in turn sold the shares to the public and other broker-dealers. A Form F-1 Registration Statement and a Prospectus (the "Offering Documents") were prepared and filed with the Securities and Exchange Commission. (Compl. ¶ 141.) On December 11, 2001, the IPO took place, and thereafter Converium shares traded on the SWX Swiss Exchange. In addition, American Depositary Shares ("ADSs"), each representing one-half of one share, began

trading on the New York Stock Exchange. (Compl. ¶¶ 91-92.) Converium received none of the proceeds from the sale of shares or ADSs, which were sold by ZFS to the underwriters. (Bodkin Aff., Ex. 2 at 10.)

C. The Offering Documents

The Offering Documents describe in detail Converium's formation and its corporate structure, its business and financial condition, and its business strategy for the future. Financial statements for the prior three years[5] were reported on a consolidated basis, and results of operations were also reflected by operating (or geographical) segment. (Bodkin Aff., Ex. 2 at 46, et seq.)

The Offering Documents also describe Converium's loss and loss adjustment expense reserves, and the processes by which such reserves are estimated. (Compl. ¶ 144.) The Offering Documents discuss in detail the risks associated with Converium's reserves, including the risk that they may prove not to be adequate to cover future losses and the consequences of that occurring. (Compl. ¶ 146.) For example, page 14 of the Prospectus, in a section entitled "**Our loss reserves may not adequately cover future losses and benefits**," states:

> Our loss reserves may prove to be inadequate to cover our actual losses and benefits experience. To the extent loss reserves are insufficient to cover actual losses, loss adjustment expenses or future policy benefits, we would have to add to these loss reserves and incur a charge to our earnings which could have a material adverse effect on our financial condition, results of operations and cash flows.
>
> Loss reserves do not represent an exact calculation of liability, but rather are estimates of the expected cost of the ultimate settlement of losses. All of our loss reserve estimates are based on actuarial and statistical projections, at a given time, of facts and circumstances known at that time and estimates of trends in loss

[5] Because ZFS did not report its financial results under U.S. GAAP, Converium's financial statements had to be substantially restated to comply with U.S. GAAP reporting requirements. (Bodkin Aff., Ex. 2 at 12.)

> severity and other variable factors, including new concepts of liability and general economic conditions. Changes in these trends or other variable factors could result in claims in excess of our loss reserves.
>
> Unforeseen losses, the type or magnitude of which we cannot predict, may emerge in the future. These additional losses could arise from newly acquired lines of business, changes in the legal environment, extraordinary events affecting our clients such as reorganizations and liquidations or changes in general economic conditions.
>
> In addition, because we, like other reinsurers, do not separately evaluate each of the individual risks assumed under reinsurance treaties, we are largely dependent on the original underwriting decisions made by ceding companies. We are subject to the risk that our ceding companies may not have adequately evaluated the risks to be reinsured and that the premiums ceded to us may not adequately compensate us for the risks we assume.

(Bodkin Aff., Ex. 2 at 14 (emphasis in original).)

The Complaint alleges that the Offering Documents were false and misleading and omitted material information concerning Converium's loss reserves. In particular, the Complaint alleges that Converium's net reserves at the time of the IPO were deficient by $225 million.[6] (Compl. ¶ 95.) The evidence of this deficiency is allegedly found in a preliminary reserve "study" purportedly presented to the Company in April 2001 by Tillinghast, an insurance industry consulting business operated by Towers Perrin. (Compl. ¶ 82.) Tillinghast was retained by ZFS in anticipation of the IPO to "obtain an accurate, independent and unbiased estimate of Zurich Re (North America)'s reserve deficienc[ies]. . . ." (Compl. ¶ 81.) The Tillinghast review commenced during the second quarter of 2001 and was completed in the third quarter. (Bodkin Aff., Ex. 2 at 123.) Tillinghast reviewed Converium's non-life reserves as of December 31, 2000, which included the reserves of ZFS's then U.S. subsidiary ZRNA. (Id.)

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[6] Converium's net reserves at December 31, 2000 totaled $3,333.8 million. (Bodkin Aff., Ex. 2 at 14.)

Plaintiffs allege that an initial Tillinghast analysis determined that ZRNA's reserve deficiency was $350 million. (Compl. ¶ 82.) The Complaint acknowledges, however, that Tillinghast revised this purported initial estimate. (Compl. ¶ 86.) The Complaint concedes that, "as of the summer of 2001," Tillinghast was reporting a deficiency in ZRNA's reserves of only $186 million—not $350 million. (Id.) This $186 million estimate was actually contained in a "preliminary draft report" that Tillinghast issued on May 25, 2001. (Bodkin Aff., Ex. 4 at Summary Exhibit 1, Sheet 1b.) The draft report made quite clear that even this number was not final, indicating that portions of the "preliminary draft report" had "not been fully peer reviewed" and were "subject to change." (Id. at 1-2.) And, unmistakably, "DRAFT" is stamped in large capital letters across every page of the report.

Tillinghast's final report was not issued until September 2001.[7] The final Tillinghast report makes clear that the Company's reserves—increased during the first half of 2001 by recorded additional provisions of $112 million, net of a $13 million reserve redundancy in Europe—were squarely within its range of estimates, a fact accurately disclosed in the Prospectus. (Compl. ¶ 89; Bodkin Aff., Ex. 5 at 6; Ex. 2 at 123.) The Prospectus also states (and the Complaint does not contest) that Tillinghast confirmed that Converium's held reserves corresponded to Tillinghast's best estimate. (Id.) Tillinghast specifically consented to these disclosures in an exhibit to the Registration Statement.[8] (Bodkin Aff., Ex. 6.)

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[7] On October 17, 2001, Tillinghast issued a corrected version of its September 2001 report which, in all material respects, was identical to its predecessor; the former merely addressed a typographical error in the text at the top of page 5 of the latter in order to make the narrative correspond with the figures included in Table 1. (Bodkin Aff., Ex. 5 at 5.)

[8] Plaintiffs cannot avoid Tillinghast's report on this motion to dismiss by declining to append it to the Complaint. Because Plaintiffs rely on it elsewhere in their pleading (see, e.g., Compl. ¶¶ 3, 60, 81, 85-87, 144), it is properly considered on this motion to dismiss. See In re Merrill Lynch & Co. Research Reports Sec. Litig., 273 F. Supp. 2d 351, 356-57 (S.D.N.Y. 2003) (holding that a court may consider on a motion to dismiss "documents 'integral' to the complaint and relied upon in it, even if not attached or incorporated by reference"); White v. H&R Block, Inc., No. 02-8965, 2004 WL 1698628, at *2 (S.D.N.Y. 2004) (finding that the review of documents on a dismissal motion may encompass "any written instrument

The Complaint attempts to suggest that Tillinghast's final reserve report was the result of improper pressure exerted by ZRNA. According to Plaintiffs, "Converium and the Officer Defendants knew that ZFS could not proceed with either a sale or public offering of Converium with a $350 million deficiency" (Compl. ¶ 84), and, therefore, ZRNA actuaries set out to "convince" Tillinghast that ZRNA's reserve deficiencies were less than this amount. (Compl. ¶ 86.) Plaintiffs assert that the Company "pulled out every stop" and "worked [Tillinghast] to death to get that number down." (Id.)

Notably, the Complaint nowhere alleges that any relevant information was withheld from Tillinghast or that any inaccurate information was provided to it. Further, while Plaintiffs insinuate that there was something untoward about the communications between the Company and Tillinghast, the Complaint nowhere alleges any facts to support such an inference. To the contrary, the Complaint does not contend that Tillinghast engaged in any improper conduct, performed incompetently, or was duped.

Tillinghast was not the only expert to review the Company's reserves. Those reserves were reviewed by the Company's auditors, PricewaterhouseCoopers Ltd. ("PricewaterhouseCoopers"), whose audit opinion was included in the Offering Documents. (Bodkin Aff., Ex. 2 at F-2.) Like Tillinghast, PricewaterhouseCoopers consented to the use of its opinion in the Registration Statement. (Bodkin Aff., Ex. 7.) The audit opinion stated that Converium's December 31, 2000, 1999 and 1998 balance sheets (which included, of course, the

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attached to [the Complaint] as an exhibit or any statements or documents incorporated in it by reference . . . and documents that the plaintiffs either possessed or knew about and upon which they relied in bringing suit")) (citations omitted); International Audiotext Network, Inc. v. American Tel. and Tel. Co., 62 F.3d 69, 72 (2d Cir. 1995) ("Although the amended complaint in this case does not incorporate the Agreement, it relies heavily upon its terms and effect; therefore, the Agreement is 'integral' to the complaint, and we consider its terms in deciding whether [plaintiff] can prove any set of facts that would entitle it to relief."); Cortec Indus., Inc. v. Sum Holding L.P., 949 F.2d 42, 48 (2d Cir. 1991) ("The district court . . . could have viewed [the documents] on the motion to dismiss because there was undisputed notice to plaintiffs of their contents and they were integral to plaintiffs' claim").

Company's reserves) and the related statements of income, cash flows and changes in equity fairly presented in all material respects the financial position of Converium in conformity with accounting principles generally accepted in the United States. (Bodkin Aff., Ex. 2 at F-2.) As is the case with Tillinghast, Plaintiffs have not claimed that any information was withheld from the auditors or accused PricewaterhouseCoopers of incompetence or wrongdoing.

D. Reserve Developments After the IPO

The Complaint alleges that following the IPO, Converium's reserves deteriorated. For example, it is alleged that CRNA experienced "up to" $80 million in adverse loss development "just 20 days after the IPO," and that additional adverse development occurred in each quarter of 2002 in an amount of "up to $50 million." (Compl. ¶¶ 103-04.) The Complaint does not allege who calculated these alleged reserve deficiencies, when or how.

At the same time, the Complaint makes clear that in 2002 CRNA and the Company announced further substantial reserve strengthening in response to adverse loss development. In May and July of 2002, the Company announced that CRNA recorded adverse reserve development in the amounts of $39 million and $19.9 million, respectively. (Bodkin Aff., Ex. 8 at 47; Ex. 9 at 12.) After appropriate offsets due to positive developments in other segments, Converium announced in May and July Company-wide reserving increases of $11.6 million and $24.4 million. (Bodkin Aff., Ex. 8 at 47; Ex. 9 at 11.)

Thereafter, on October 28, 2002, the Company announced that it was strengthening reserves by another $59.6 million ($47 million of which was attributable to CRNA), and that this strengthening, along with the previously announced $24.4 million increase,

amounted to $84 million[9] for the first nine months of 2002 (the "October 28 Release"). That same announcement estimated that additional strengthening of up to $75 million would be required in the fourth quarter of 2002. (See Compl. ¶ 160.) Less than four weeks later, on November 19, 2002, Converium announced that it was taking "additional provisions for losses on [various lines of business] of US$ 70.3 million. . . ." (Bodkin Aff., Ex. 10 at 1.) This November 19 release further stated that "[s]ince the fourth quarter 2000," the Company recorded "a total of US$382.2 million net of additional provisions for prior years' liability lines" at CRNA for the years 1997 to 2000. (Id. at 2.)

The Complaint alleges that the Company's October 28 Release "sent the price of Converium shares and ADSs tumbling." (Compl. ¶ 164.) Ratings agencies downgraded the projected outlook for the Company from stable to negative. (Bodkin Aff., Ex. 11-13.) One of the Plaintiffs, LASERS, sold more than 38,000 ADSs in response to this announcement. (Bodkin Aff., Ex. 14 at 2.) According to Plaintiffs, these sales followed "the partial disclosure of Converium's true reserve position, which was misrepresented in the registration statement and prospectus." (Id.)

Plaintiffs allege that even with these reserve increases during 2002, the Company was substantially under-reserved at year-end. (Compl. ¶ 107.) The Complaint alleges that an internal study initiated by Jean-Claude Jacob, the Company's global reserving actuary in Switzerland, showed that the North American net loss reserves "as at 4Q02 were US $268M below Group Corporate Actuarial (CGA) preliminary estimate." (Id.) The Complaint does not

[9] This figure is comprised of the $59.6 million figure plus the $24.4 million increase announced in the 2002 Half-Year Report. It does not contain the $11.6 million announced in the 2001 Form 20-F because this was recorded by the Company in the second half of 2001.

allege when Mr. Jacob's alleged study was completed. Nor does it allege what group corporate actuarial's preliminary or final estimate was. (Id.)

The Complaint further alleges that Converium's Board of Directors were "concerned that the Company was not adequately reserved and wanted to obtain an independent study of the Company's reserve position." (Compl. ¶ 108.) They thus retained another well-respected actuarial consulting firm, "B&W Deloitte ('Deloitte'), the actuarial consulting group of Deloitte & Touche LLP, to conduct an independent study of the Company's reserves as of year-end 2002." (Id.) The Complaint explains that "[i]n order to ensure that Deloitte conducted an independent, objective analysis of the Company's reserves, the Company's senior management, including Defendants Lohmann and Kauer," provided Deloitte with the Company's "raw data on claims, and not Converium's analysis of its own loss reserves" and further that Converium undertook appropriate efforts "[t]o ensure that Deloitte's reserve study was not influenced by Converium's internal assessments. . . ." (Compl. ¶¶ 109, 112.) There is no allegation that the data provided to Deloitte was incomplete or inaccurate in any way.

The Complaint alleges that, according to Deloitte, the deficiency at the Company's North American operations for the year ended 2002 was actually $437 million, which was larger than the Jacob study suggested. (Compl. ¶ 114.) Plaintiffs base this assertion on Deloitte's "preliminary" analysis, much like they base their reserve deficiency argument at the time of the IPO on Tillinghast's alleged preliminary estimate. Deloitte's final analysis actually indicated a far smaller reserve deficiency at CRNA of $172 million. (Bodkin Aff., Ex. 15 at 7.) Importantly, while the Complaint alleges that Deloitte conducted "a very diligent and accurate review of all of the reserves of Converium America and Converium Zurich" (Compl. ¶ 110), the Complaint fails to mention the results of this final Deloitte study or Deloitte's

conclusions as to the adequacy of Converium's reserves on a consolidated basis. There is little mystery why: Deloitte determined that Converium's reserves on a consolidated basis included a surplus of $56 million. (Bodkin Aff., Ex. 15 at 7.)

The Complaint attempts to use the non-existent $437 million reserve deficiency as a foundation from which to allege that CRNA was under-reserved by an "astounding" $776.9 million as of June 30, 2003. That is, the Complaint claims that "according to internal Company documents, during the first half of 2003 Converium North America experienced additional adverse loss development of $339.9 million" which "exacerbated the [$437 million] deficiency . . . that existed at the end of 2002" so that CRNA was under-reserved by more than $776.9 million by the end of the first half of 2003. (Compl. ¶¶ 120-122.) The Complaint does not identify the title, author, date or recipients of the "internal Company documents" to which it refers.[10]

The Complaint further challenges steps taken by the Company in 2003 allegedly to hide reserve deficiencies, including the decision to report its results by line of business rather than geographically. (Compl. ¶¶ 123-140.) This decision, however, was hidden from no one. It was announced in the Company's October 3, 2003 Press Release:

> At the time of its IPO in December 2001, Converium adopted an organizational model based on geography. This structure was driven by the historical development of its then parent, Zurich Financial Services. Over its first 22 months as an independent reinsurer, Converium has become more globally integrated, and the issues of legal entity and geography have become less relevant criteria when determining business strategy, capital allocation and

[10] Plaintiffs also allege that "Deloitte predicted total loss development of $334.1 million during the first two quarters of 2003, and [that an internal Converium document reveals that] Converium North America experienced actual loss development of $339.9 million—a difference of just $5.8 million, or 1.7%." (Compl. ¶¶ 120-122.) The Complaint does not identify who authored this alleged internal document nor to whom it was distributed. It also fails to explain why Deloitte would produce a report finding that the Company had a reserve surplus while at the same time predicting that those reserves would be inadequate just a few months later, if indeed that is what Deloitte was doing.

> the adoption of best practice throughout the organization. It is now apparent that a structure based on global functional areas is required to ensure that Converium is fully aligned with its strategy, and to deploy company resources and capabilities most efficiently.

(See Bodkin Aff., Ex. 16 at 1.) Further, while the Complaint implies that Statement of Financial Accounting Standards ("SFAS") 131 requires reporting of reserves by geographical segment (Compl. ¶ 227), SFAS 131 clearly requires no such thing. Thus, Converium's decision to report by line of business was entirely consistent with SEC requirements and accounting rules.[11]

Plaintiffs also allege that "under the cloak of Converium's new reporting structure, the Company shifted tens of millions of dollars from the books of Converium North America to Converium Zurich" through a series of novations that "secretly" released reserves. (Compl. ¶ 192). According to the Complaint, the "true purpose for [this] change was to obscure the deterioration in the North American business." (Compl. ¶ 188.) Far from being secret, the novations and their impact on reserving were expressly approved by the Connecticut Insurance Department on September 19, 2003—before being implemented. The State of Connecticut Insurance Department's Examination Report[12] states that:

> On August 21, 2003 CRNA filed a Form D with the Division for prior approval of a novation strategy for certain CRNA treaties. The treaties would be novated to Converium Holdings in Switzerland. . . . This novation strategy was approved by the Division on September 19, 2003.
>
> Under the approved novation strategy, CRNA will novate to Converium AG certain treaties that it has entered into with

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[11] The October 3rd Release further states that this change in reporting structure would better reflect the global status of reserving for the Company as a whole and would bring Converium in line with competitors, who had been reporting in this manner for years. (Bodkin Aff., Ex. 16, Press Release, dated October 3, 2003, at 2.)

[12] The Triennial Examination Report, which was issued by the Insurance Department of the State of Connecticut is publicly available upon request; it therefore may be considered here. See, e.g., Johns v. Town of East Hampton, 942 F. Supp. 99, 104 (E.D.N.Y. 1996) (considering an Accreditation Report issued by New York State Division of Criminal Justice Services on a motion to dismiss because it was a public document, the authenticity of which was not questioned); see also supra at 11 n.8 (citing cases).

> reinsureds. In the aggregate, the novated treaties are expected to result in CRNA transferring to Converium AG a greater amount of total outstanding loss reserves than the amount of net premium and interest it transfers to Converium AG. CRNA has indicated plans to strengthen its loss reserves to offset this income from the novations.
>
> CRNA expects to complete the novations prior to December 31, 2003.

(Bodkin Aff., Ex. 17 at 26) (emphasis added). The novations were further referred to in the Company's 2003 Form 20-F and audited statutory financial statements. (Bodkin Aff., Ex. 18 at F-24; Ex. 19 at 109.)

Additionally, the Complaint does not allege that the novations affected the consolidated financial position of Converium in any material way. The novations in fact merely transferred reinsurance contracts, including premiums received and established reserves covering losses under those contracts, from one business unit to another within the global organization. (Compl. ¶ 128.) Plaintiffs do not assert that Converium's consolidated reserves, its balance sheet or its income statement were impacted as a result.

Finally, the Complaint alleges that efforts were made in late 2003 and in mid-2004 to prevent disclosure of additional adverse loss development. Specifically, it is alleged that Confidential Witnesses No. 1 and No. 5 were told by Jean-Claude Jacob and Joanne Spalla to "bury" at least $45 million of such development. (Compl. ¶ 134.) Yet there is no suggestion that any Director or Officer Defendant knew of or issued this purported instruction. The Complaint also alleges that in the second quarter of 2004 Defendant Lohmann asked Ms. Spalla to "bury" $40 million in adverse loss development. But there is no allegation that Ms. Spalla did so, however; and, in fact, the Complaint specifically alleges that she refused. (Compl. ¶ 204.)

E. Procedural History

The first of these consolidated class action lawsuits was brought on October 4, 2004, captioned Meyer v. Converium Holding AG, et al., 04 CV 07897. Thereafter, between October 12 and December 2, five additional complaints were filed. These complaints, initiated by eight different law firms, limited their allegations to Exchange Act violations; none contained any claims under the Securities Act. On December 9, 2004, a class action complaint captioned Rubin v. Converium Holding AG, et al., Index No. 04117332, was filed in the Supreme Court of the State of New York, County of New York. That complaint asserted claims exclusively under the Securities Act.[13]

On July 14, 2005, this Court approved a stipulation consolidating each of the class action complaints initially filed in federal court and appointed putative class members Public Employees' Retirement System of Mississippi and Avalon Holdings Inc. as co-lead plaintiffs.[14] The Lead Plaintiffs served their Consolidated Amended Class Action Complaint on September 23, 2005, in which, for the first time, they asserted claims under the Securities Act and added the Underwriters as defendants. Accordingly, these Plaintiffs did not assert Securities Act claims based on the Company's IPO until fourteen months after Converium announced its $400 million reserve strengthening which Plaintiffs have characterized as "shock[ing]" (Compl. ¶ 210), and almost a year after the first of these actions was instituted.

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[13] On April 15, 2005, the Rubin action was removed to the Southern District of New York. On May 17, 2005, Rubin served a motion to remand his case to state court. On June 23, 2005, Rubin agreed to withdraw his motion to remand.

[14] On November 4, 2005, Plaintiffs submitted to the Court a proposed order, which, among other things, provides for the consolidation of the Rubin action.

Notwithstanding the encyclopedic length of the Complaint and Plaintiffs' alleged access to several confidential witnesses claimed to be former employees of the Company, a careful analysis of the Complaint plainly demonstrates that it fails to state any claim under the federal securities laws.

ARGUMENT

The standards by which Plaintiffs' allegations must be measured are well established. While on a motion to dismiss Plaintiffs' factual allegations must be accepted as true, this applies only to well-pleaded allegations. See Papasan v. Allain, 478 U.S. 265, 286 (1986). "[L]egal conclusions, deductions or opinions couched as factual allegations are not given a presumption of truthfulness." Mason v. American Tobacco Co., 346 F.3d 36, 39 (2d Cir. 2003) (quoting United States v. Bonanno Organized Crime Family of La Cosa Nostra, 879 F.2d 20, 27 (2d Cir. 1989)); see Papasan, 478 U.S. at 286. Similarly, "subjective characterizations of documents properly before" the court need not be adopted. Polar Int'l Brokerage Corp. v. Reeve, 108 F. Supp. 2d 225, 241 (S.D.N.Y. 2000) (citing Madonna v. United States, 878 F.2d 62, 65 (2d Cir. 1989)). Further, a court should not accept as true allegations that are contradicted by documents properly before it on a motion to dismiss. See In re Aegon N.V. Sec. Litig., No. 03 Civ. 0603, 2004 WL 1415973, at *5 (S.D.N.Y. June 23, 2004) ("The truth of factual allegations that are contradicted by documents properly considered on a motion to dismiss need not be accepted.") (citation omitted); Rapoport v. Asia Elecs. Holding Co., 88 F. Supp. 2d 179, 184 (S.D.N.Y. 2000) ("If . . . documents contradict the allegations of the amended complaint, the documents control and this Court need not accept as true the allegations in the amended complaint."); Feick v. Fleener, 653 F.2d 69, 75 (2d Cir. 1981) ("[Where] the documents upon which [plaintiffs base] their claim show on their face absence of any grounds for relief, dismissal [is] proper.") (citation omitted). Nor is a plaintiff entitled to have unreasonable inferences drawn

in its favor on a Rule 12(b)(6) motion. See, e.g., Hirsch v. Arthur Andersen & Co., 72 F.3d 1085, 1095 (2d Cir. 1995) (conclusory allegations of "control" not entitled to be accepted as true where allegations elsewhere in complaint suggested otherwise); First Nationwide Bank v. Gelt Funding Corp., 27 F.3d 763, 771-72 (2d Cir. 1994) (court not required to draw unreasonable inferences in plaintiff's favor).

I. PLAINTIFFS' SECURITIES ACT CLAIMS MUST BE DISMISSED.

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

Plaintiffs assert a claim under Section 11 of the Securities Act (15 U.S.C. § 77k) against Converium and the Individual Defendants and a claim under Section 12(a)(2) of the Securities Act (15 U.S.C. § 77l(a)) against the Company. (See Compl. ¶¶ 237-258.) These claims must be dismissed because Plaintiffs do not adequately allege that the Offering Documents contained any material misrepresentation or omission.

1. Standards Applicable To The Pleading Of Plaintiffs' Securities Act Claims.

Section 11 of the Securities Act authorizes suits to be brought against, among others, issuers and signatories of a registration statement that "contain[ed] an untrue statement of a material fact or omitted to state a material fact . . . necessary to make the statements therein not misleading." 15 U.S.C. § 77k. Section 12(a)(2) permits a proceeding to be brought against "any person who . . . offers or sells a security . . . by means of a prospectus or oral communication, which includes an untrue statement of material fact or omits to state a material fact necessary in order to make the statements . . . not misleading. . . ." 15 U.S.C. § 77l(a).

A misstatement or omission is material if there is a "substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the total mix of information made available." Halperin v. eBanker

USA.com, Inc., 295 F.3d 352, 357 (2d Cir. 2002) (quoting Basic Inc. v. Levinson, 485 U.S. 224, 231-32 (1988) (citation and internal quotations omitted)). "A fact is to be considered material if there is a substantial likelihood that a reasonable person would consider it important in deciding whether to buy or sell shares [of stock]." Halperin, 295 F.3d at 357 (quoting Azrielli v. Cohen Law Offices, 21 F.3d 512, 518 (2d Cir. 1994) (alteration in original)). "Fair accuracy, not perfection, is the appropriate standard." Kennecott Copper Corp. v. Curtiss-Wright Corp., 584 F.2d 1195, 1200 (2d Cir. 1978) (with respect to alleged 14(a) claims, "nit-picking should not become the name of the game").

The Second Circuit has made it abundantly clear that the materiality of statements alleged to be misleading or false must be considered in context. Rombach v. Chang, 355 F.3d 164, 172 n.7 (2d Cir. 2004) ("The test for whether a statement is materially misleading under Section 10(b) and Section 11 is 'whether the defendants' representations, taken together and in context, would have misled a reasonable investor.'") (quoting Meyer Pincus & Assoc., P.C. v. Oppenheimer & Co., 936 F.2d 759, 761 (2d Cir. 1991). Thus, "[t]he touchstone of the inquiry is not whether isolated statements within a document were true" but whether a defendant's statements, considered in the aggregate, "would affect the total mix of information and thereby mislead a reasonable investor regarding the nature of the securities offered." Halperin, 295 F.3d at 357. This principle is frequently applied where the allegedly misleading statements were accompanied by cautionary language "bespeak[ing] caution" about the reliability of those statements. Rombach, 355 F.3d at 173. In such circumstances it has been held that the allegedly misleading statements are immaterial as a matter of law. See id.; In re CIT Group, Inc., Sec. Litig., 349 F. Supp. 2d 685, 688-690 (S.D.N.Y. 2004).

Additionally, because Plaintiffs' allegations sound in fraud, they must satisfy the pleading requirements of Fed. R. Civ. P. 9(b). See Rombach v. Chang, 355 F.3d 164, 170 (2d. Cir 2004); In re Philip Servs. Corp. Secs. Litig., 383 F. Supp. 2d 463, 480 (S.D.N.Y. 2004). Rule 9(b) requires that "the circumstances constituting fraud . . . must be stated with particularity." Fed. R. Civ. P. 9(b). Plaintiffs must therefore: "(1) specify the statements that [they] contend . . . were fraudulent; (2) identify the speaker; (3) state where and when the statements were made; and (4) explain why the statements were fraudulent." Rombach, 355 F.3d at 170 (internal quotation marks and citation omitted); In re NBTY, Inc. Secs. Litig., 224 F. Supp. 2d 482, 491 (E.D.N.Y. 2002) (quoting Acito v. IMCERA Group, Inc., 47 F.3d 47, 51 (2d Cir. 1995). "In cases where the alleged fraud consists of an omission and the plaintiff is unable to specify the time and place because no act occurred, the complaint must still allege: (1) what the omissions were; (2) the person responsible for the failure to disclose; (3) the context of the omissions and the manner in which they misled the plaintiff, and (4) what defendant obtained through the fraud." Odyssey Re (London) Ltd. v. Stirling Cooke Brown Holdings Ltd., 85 F. Supp. 2d 282, 293 (S.D.N.Y. 2000) (citations omitted).

Plaintiffs cannot avoid this heightened pleading requirement here by their self-serving, conclusory and boilerplate allegations that their Securities Act claims do not sound in fraud. (Compl. ¶¶ 238, 249, 260). Indeed, the Second Circuit has explicitly instructed courts to ignore such assertions. Rombach, 355 F.3d at 172. Courts are to apply Rule 9(b) where "the wording and imputations of the complaint are classically associated with fraud . . . ." Id. This is manifest where a pleading alleges, as does the Complaint, that "the Registration statement was inaccurate and misleading; that it contained untrue statements of material facts; and that materially false and misleading written statements were issued." Id. (internal quotations

omitted). (See Compl. ¶¶ 240, 250, 261, 270.)[15] It is also manifest where, as here,[16] they are based on the same purported scheme that forms the basis for a plaintiff's claim under Section 10(b) of the Securities Exchange Act of 1934 (15 U.S.C. § 78j(b)). Central Laborers Pension Fund v. Merix Corp., No. CV04-826-MO, 2005 WL 2244072, at *5 (D. Or. Sept. 15, 2005) (holding that, where a plaintiff "alleges a 'unified course of fraudulent conduct' and relies on that conduct as the basis of its Securities Act claim, 'the claim is said to be grounded in fraud'. . . and the pleading of that claim as a whole must satisfy the particularity requirements of Rule 9(b).") (citation omitted); In re Van Wagoner Funds, Inc. Sec. Litig., No. C 02-03383 JSW, 2004 WL 2623972, at *3 (N.D. Cal. July 27, 2004) (same).

For the foregoing reasons, the Complaint must state the basis for its claims, including the manner in which the Offering Documents included a material misrepresentation or omission, with particularity. It does not do so.

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

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

Plaintiffs' Securities Act claims are based entirely on their allegation that the Offering Documents did not disclose that Converium's pre-IPO loss reserves were deficient by $225 million. (Compl. ¶ 95.) This contention is predicated on information allegedly provided by Tillinghast to Company personnel in April 2001, which purportedly identified a $350 million

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15 For example, the Complaint alleges that "the Officer Defendants issued, caused to be issued, and participated in the issuance of materially false and misleading written statements that were contained in the Registration Statement, which misrepresented or failed to disclose, among other things, the facts set forth above." (Compl. ¶ 252). Similarly, at paragraph 270, the Complaint alleges that "[t]he Prospectus contained untrue statements of material fact and omitted other facts necessary to make the statements not misleading, and failed to disclose material facts. . . . Converium's actions and solicitations included participating in the preparation of the materially false and misleading Prospectus." (Compl. ¶ 270.)

16 Compare Compl. ¶¶ 239, 250 with Compl. ¶ 299; see also id. ¶ 10.

deficiency at ZRNA. (Compare Compl. ¶ 86 with Compl. ¶ 82.) The Complaint alleges that notwithstanding this information the Company strengthened ZRNA's reserves by only $125 million prior to the IPO, thus leaving the $225 million undisclosed deficiency. (Compl. ¶¶ 82, 87, 95, 143, 144, 146, 148).[17] The allegations of the Complaint itself and the documents that it references make clear that there was no such misrepresentation.

As the Complaint reveals, the alleged $350 million reserve deficiency purportedly communicated by Tillinghast to the Company in April 2001 could be nothing more than a preliminary estimate based upon Tillinghast's initial work. (Compl. ¶ 86.) The Complaint grudgingly acknowledges that Tillinghast subsequently reduced its estimate of the reserve deficiency substantially. That is, according to the Complaint, internal Converium documents show that, "as of the summer of 2001, Tillinghast's 'best estimate' was that reserves" at ZRNA were deficient by $186 million. (Compl. ¶ 86). Even this number was preliminary, however; Tillinghast's May 2001 report on which this number is based is specifically denominated a draft. (See infra at 10.)

Tillinghast's final report in fact determined that ZRNA's reserves as of December 31, 2000 were only $162 million below its best estimate (not $350 million, as Plaintiffs suggest). This put the Company's reserves well above the low end of the range of estimates that Tillinghast provided, even without the $112 million reserve strengthening prior to the IPO. (Bodkin Aff., Ex. 5 at 5-6.) The reserves were also squarely in line with Tillinghast's principally

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[17] The Complaint alleges that the following representations were materially false and misleading: (1) the Company's financial results—to the extent that they do not take into account that "Converium (and Converium North America) were under-reserved by at least $225 million" (Compl. ¶ 143); (2) the statement that reserves were "in-line" with Tillinghast's range of estimates (Compl. ¶ 144); (3) the statement that the Company's reserves were established in accord with the reasonable estimates available to it at the time (Compl. ¶ 146); and (4) the warning that loss reserves "may prove to be inadequate to cover our actual losses," because the Company already knew when it made this statement that they in fact were inadequate. (Compl. ¶ 148.)

top-down reserve estimates and within its range of estimates. Following the $112 million strengthening, Tillinghast confirmed for the Company that its reserves corresponded to its best estimate (a fact the Complaint does not dispute). (Bodkin Aff., Ex. 2 at 123.)

The Offering Documents made detailed disclosure of the work Tillinghast had done and its conclusions:

> Since reserving is an inherently uncertain process, we retained, in the second quarter of 2001, the actuarial consulting firm Tillinghast-Towers Perrin, or Tillinghast, to perform an independent review of our non-life net reserves as of December 31, 2000. In their analysis, Tillinghast relied on data available at the time we issued our December 31, 2000 financial statements, and also on certain information that became available subsequently. Tillinghast has relied on us as to the accuracy and completeness of this data and information. Based on the Tillinghast analysis, which reflected certain information that became available after the issuance of our December 31, 2000 financial statements and based on our own evaluations of these new developments, we determined to record in the first half of 2001 additional provisions of $112 million, net of reinsurance, principally related to accident years 2000 and prior at Converium North America. Tillinghast has confirmed to us that our net reserves as of December 31, 2000 plus the first half of 2001 reserve strengthening correspond to Tillinghast's best estimate of our liabilities for net loss and loss adjustment expenses as of December 31, 2000 for Converium on a historical combined basis. Tillinghast has not conducted another review with respect to our reserves at June 30, 2001 or any other subsequent period.
>
> The $112 million reserve strengthening discussed above was determined in accordance with our loss reserving policies as described in "—Establishment of Loss and Loss Adjustment Expense Reserves", and was recorded in accordance with our established accounting policies as described in Note 2(e) of our historical combined financial statements. Under these policies we review and update our reserves as experience develops and new information becomes known, and we bring our reserves to a reasonable level within a range of reserve estimates by recording an adjustment in the period when the new information confirms the need for an adjustment. The Tillinghast review was begun during the second quarter of 2001 and completed in the third quarter. Tillinghast actuaries had conducted similar reviews for other

> insurers and reinsurers and were able to refer to their proprietary loss development data. Tillinghast also used several top-down approaches including their broad database of insurance and reinsurance loss trends. Tillinghast actuaries and our Converium actuaries were also able to access information that was not known in the first quarter of 2001 when we completed our year-end 2000 financial reporting to Zurich Financial Services. This information included most fourth quarter 2000 and some first quarter 2001 reports from our ceding companies who typically report on a one-quarter lag. Analyses of these reports in relation to earlier periods' reports, disclosed adverse loss development across several lines of business, mainly relating to general liability, commercial auto liability and umbrella policy business written in 1996 through 1999. We reviewed and evaluated this new information as we completed our first half 2001 financial reporting. Our revised estimate of reserves, based mainly on the new ceding company reported data, was in line with Tillinghast's principally top-down reserve estimate within its range of estimates. Accordingly, we recorded an adjustment to loss and loss adjustment reserves at that time.

(Bodkin Aff., Ex. 2 at 123.)

The Complaint provides no reasonable basis for its reliance on the initial estimate allegedly communicated by Tillinghast in April 2001 rather than on Tillinghast's final report issued in September 2001, five months later.[18] The Complaint does nothing to suggest that the final Tillinghast report was anything other than the competent work product of a well-respected actuarial consultant that was prepared in good faith. The Complaint itself alleges that in retaining Tillinghast, ZFS sought to "obtain an accurate, independent and unbiased estimate of Zurich Re North America's reserve deficiency." (Compl. ¶ 81.) Plaintiffs do not allege that any relevant information was withheld from or that any inaccurate or doctored data was provided to

[18] Among other things, the initial Tillinghast estimates were certainly stale by the time it finished its work and were immaterial as a matter of law. See In re Kidder Peabody Secs. Litig., No. 94 Civ. 3954, 1995 WL 590624, at *5 (S.D.N.Y. Oct. 4, 1995) ("Stale information is not material as a matter of law."). There is simply no obligation to disclose a preliminary actuarial report any more than there is to disclose a preliminary audit opinion.

Tillinghast. Nor does the Complaint allege that Tillinghast made any erroneous actuarial assumptions or committed any other mistake in connection with its final report.

Plaintiffs do attempt to undermine the credibility of Tillinghast's final report with allegations that Zurich Re's actuaries set out to "convince" Tillinghast through a series of "negotiations" that its alleged April 2001 $350 million deficiency figure was wrong. The Complaint vaguely alleges that Converium employees "worked [Tillinghast] to death" and "pulled out every stop." (Compl. ¶ 86.) The Complaint is utterly devoid, however, of any allegation suggesting that give and take between the Company and its actuarial consultants was improper in any respect. Notably, the Complaint does not charge Tillinghast with any wrongdoing, intentionally or otherwise. The inference that Converium persuaded Tillinghast to fudge the numbers is simply unsupported by any well-pled factual allegations and is entirely unreasonable.

Moreover, as the Offering Documents make clear, PricewaterhouseCoopers certified the Company's 2000 financials, which included the reserves that Plaintiffs' claim were materially deficient. (Bodkin Aff., Ex. 2 at F-2.) Those financial statements were included in the Offering Documents in reliance on the report of PricewaterhouseCoopers given on the authority of that firm as experts in auditing and accounting. (Id.; Bodkin Aff., Ex. 7.) In other words, the Company's auditors certified the financial statements that are at the core of Plaintiffs' claims. Tellingly, the Complaint does not mention PricewaterhouseCoopers even once, much less attack the work or audit opinion covering loss reserve estimates by that firm. The existence of that unchallenged audit opinion completely undercuts Plaintiffs' fundamental premise that the Company's reserves were misstated—and Plaintiffs' reliance on Tillinghast's preliminary work to support that premise.

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

The disclosures about which Plaintiffs complain—the Company's reserves—involve matters of opinion and judgment. As the Second Circuit has noted, loss reserves of casualty risk reinsurers are based in large part upon informed guesswork. See Delta Holdings, Inc. v. Nat'l Distillers & Chemical Corp., 945 F.2d 1226, 1229 (2d Cir. 1991). The Court there explained why this guesswork is unavoidable:

> [t]he underwriting of third-party liability, known as "casualty risks," leads to complex problems of financing and accounting because assumption of third-party liability risks involves substantial delays or "tails" in the discovery and reporting of claims. These delays, as lengthy as fifteen or twenty years with some policies, such as medical malpractice insurance, inevitably create considerable uncertainty as to the calculation of future claims and of the reserves that must be set aside to pay those claims.

Id. at 1230. Thus, reserves on casualty policies simply cannot be determined with as much certainty as other items in a balance sheet such as outstanding principal and interest on debt instruments. Id. at 1231; see also In re Kindred Healthcare, Inc. Secs. Litig., 299 F. Supp. 2d 724, 738 (W.D. Ky. 2004) (holding that "[a]ssertions about the adequacy of . . . reserves" are "necessarily a prediction about . . . future claims experience"). This inherent uncertainty and the judgmental nature of the Company's reserves was plainly disclosed in the Prospectus itself.[19]

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[19] The Prospectus states:

> Because estimation of loss reserves is an inherently uncertain process, quantitative techniques frequently have to be supplemented by professional and managerial judgment. . . .
>
> The uncertainty inherent in loss estimation is particularly pronounced for long-tail lines such as umbrella, general and professional liability and motor liability, where information, such as required medical treatment and costs for bodily injury claims, will only emerge over time. In the overall reserve setting process, provisions for economic inflation and changes in the social and legal environment are considered. The uncertainty inherent in the reserving process

Indeed, the Prospectus highlighted the fact that estimation of reserves of reinsurers like Converium is done to a significant extent by the ceding insurance companies.[20] The message was forcefully driven home by the disclosure that the Company's reserving judgments concerning the third-party reinsurance business of ZFS had on previous occasions proven to be incorrect and that reserves had required adjustment. (Bodkin Aff., Ex. 2 at 41.)[21]

Where, as here, misrepresentation claims are based on matters of opinion and judgment, a complaint must sufficiently allege facts showing that the statement was false as to its subject matter and that the speaker knew the statement to be false when made. See Virginia Bankshares v. Sandberg, 501 U.S. 1083, 1095-96 (1991) (noting that statements of opinion may only be challenged as a misstatement of the psychological fact of the belief, and the statement must assert something impliedly false about its subject matter); In re IBM Corp. Sec. Litig., 163

> for primary insurance companies is even greater for the reinsurer. . . .
>
> [S]ince the establishment of loss reserves is an inherently uncertain process, the ultimate cost of settling claims may exceed our existing loss and loss adjustment expense reserves, perhaps materially.

(Bodkin Aff., Ex. 2 at 122-23.)

20 In this regard, the Prospectus notes:

> Upon receipt of a notice of claim from a ceding company, we establish a case reserve for the estimated amount of the ultimate settlement. Case reserves are usually based upon the amount of reserves reported by the primary insurance company and may subsequently be supplemented or reduced as deemed necessary by our claims department.

(Bodkin Aff., Ex. 2 at 121.)

21 Statements about the adequacy of reserves are also, by their nature, forward-looking. Hess v. Am. Physicians Capital, Inc., No: 5:04-CV-31, 2005 WL 459638, at *7 (W.D. Mich. Jan. 11 2005) (holding that "[s]tatements [alleged to be misleading] are forward-looking because they are assertions about the adequacy of the Company's loss reserves."); In re Kindred Healthcare, Inc. Secs. Litig., 299 F. Supp. 2d 724, 738 (W.D. Ky. 2004) ("The amount [the insurer] keeps in reserves to cover liability claims is necessarily a prediction about its future claims experience based on past claims history as well as current filings. Assertions about the adequacy of [the insurer's] reserves could only be verified when liability claims were actually filed, litigated to conclusion, or settled. It would seem rather beyond argument that such projections about the company's future economic health are forward-looking."). Because the allegedly misleading statements were forward-looking and, as set forth above, accompanied by meaningful cautionary language, they are inactionable under the bespeaks caution doctrine. (See supra at 21.)

F.3d 102, 108-09 (2d Cir. 1998); see also In re CIT Group, Inc., 349 F. Supp. 2d 685, 690 (S.D.N.Y. 2004) ("statements about defendants' belief in the adequacy of loan loss reserves could be actionable if it is alleged that defendants did not actually believe that loan loss reserves were adequate, or if defendants had no reasonable factual basis for their belief"); Faulkner v. Verizon Communs., Inc., 189 F. Supp. 2d 161, 172-173 (S.D.N.Y. 2003) ("mere opinions and predictions of future performance are not actionable under the securities laws unless they are worded as guarantees or are supported by specific statements of fact, or if the speaker does not genuinely or reasonably believe them") (internal quotation omitted); Nolte v. Capital One Fin. Corp., 390 F.3d 311, 316 (4th Cir. 2004) (applying Virginia Bankshares standard to defendant's statement that company "maintained sufficient capital and loan loss reserves").

Here, the Complaint includes no allegations from which it could be inferred that Defendants knew or believed that the Offering Documents misrepresented the adequacy of the Company's reserves. The Complaint does not even include conclusory allegations that Defendants knew that a $225 million reserve deficiency existed,[22] much less facts that would have caused them to reach that conclusion. The fact that a well-respected actuarial consultant such as Tillinghast determined that the Company's reserves as strengthened were within its range of estimates and confirmed that the reserves corresponded to Tillinghast's best estimate and that PricewaterhouseCoopers audited the Company's 2000 financial statements that included the reserves at issue completely undermines any inference that the Defendants knew or had reason to believe that the Company's reserves were wrong.

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[22] The Complaint does allege that Confidential Witness No. 1, Mashitz, Rosenberg and unidentified "senior management" knew that Tillinghast's original best estimate of $350 million was accurate. (Compl. ¶ 86.) But it does not identify the senior management or any factual basis for the supposed knowledge by these persons.

As the Complaint thus fails to allege the existence of any material misrepresentation or omission in the Offering Documents, the Securities Act claims must be dismissed.

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

Section 12(a)(2) liability is limited to those sales that take place within the context of "buyer-seller relationships resembling traditional contractual privity." Pinter v. Dahl, 486 U.S. 622, 642 (1988).[23] Section 12(a)(2), therefore, "imposes liability on only the buyer's immediate seller; remote purchasers are precluded from bringing actions against remote sellers. Thus, a buyer cannot recover against his seller's seller." Id. at 644 n.21. Liability also attaches to any person "who successfully solicits the purchase, motivated at least in part by a desire to serve his own financial interests or those of the securities owner" (Id. at 647), but that more must be shown than that a person was a "substantial factor" in the sale. Id. at 654. Thus, to be found liable under this second prong of the Pinter test, a person needs to take on a role tantamount to a "vendor's agent." Id. at 680.

Plaintiffs cannot satisfy the first prong of Pinter as a matter of law. They did not purchase Converium ADSs or shares from Converium. The Converium stock offering was conducted pursuant to a firm commitment underwriting, whereby Converium shares owned by ZFS were sold by ZFS to the underwriters, who in turn sold them to investors through the IPO. (Bodkin Aff., Ex. 2 at 191.) "In a firm commitment underwriting, the issuer of the securities sells all of the shares to be offered to one or more underwriters, at some discount from the offering price. Investors thus purchase shares in the offering directly from the underwriters (or

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[23] The Supreme Court in Pinter determined the scope of "seller" liability under Section 12(1) (now Section 12(a)(1)) of the Securities Act. 486 U.S. at 642. The Second Circuit has held that because the relevant language of Sections 12(a)(1) and 12(a)(2) is identical, both should be analyzed under Pinter. See Capri v. Murphy, 856 F.2d 473, 478 (2d Cir. 1988).

broker dealers who purchase from the underwriters), not directly from the issuer." Shaw v. Digital Equip. Corp., 82 F.3d 1194, 1215 (1st Cir. 1996). Additionally, as noted above, ZFS, not Converium, sold shares to the underwriters. Thus, none of the Plaintiffs has alleged, nor can they allege, that they or any member of the putative class purchased Converium shares or ADSs from Converium and, therefore, none can satisfy the direct purchase requirement of the statute, or Pinter's first prong.

Nor can the Complaint's conclusory allegations that Converium issued the Prospectus and therefore was "an offeror and/or solicitor of sales" satisfy the second prong of the Pinter test. As the court in Shaw stated, a "bald and factually unsupported allegation that the issuer and individual officers of the issuer 'solicited' the plaintiffs' securities purchases is not, standing alone, sufficient." Shaw, 82 F.3d at 1216. And the mere fact that Converium is alleged to have issued the Offering Documents likewise cannot suffice to state a claim under Pinter, which rejected imposing liability on those who were a "substantial factor" in a sale of securities. See Pinter, 486 U.S. at 654.

Issuers routinely issue prospectuses, and their directors and officers routinely sign registration statements. That this is not enough has been recognized by the Circuit Courts of Appeals that have addressed this issue. In Rosenzweig v. Azurix Corp., 332 F.3d 854 (5th Cir. 2003), for example, the Fifth Circuit held that "[t]he issuer may only be liable under s[ection] 12(a)(2) if the plaintiff alleges that an issuer's role was not the usual one; that it went farther and became a vendor's agent." Id. at 871. Similarly, in Craftmatic Sec. Litig. v. Kraftsow, 890 F.2d 628 (3rd Cir. 1989), the Third Circuit concluded that "although an issuer is no longer immunized from § 12 liability, neither is an issuer liable solely on the basis of its involvement in preparing the prospectus." Id. at 636. "The purchaser must demonstrate direct and active participation in

the solicitation of the immediate sale to hold the issuer liable as a § 12(a)(2) seller." Id. Faced with similar sparse allegations of solicitation as are present here, the Third Circuit Court of Appeals affirmed the dismissal of a Section 12(a)(2) claim against an issuer. Shaw, 82 F.3d at 1216. While the complaint alleged that the defendants were involved in preparing the registration statement and prospectus, the court observed that:

> under Pinter, however, neither involvement in preparation of a registration prospectus nor participation in activities relating to the sale of securities, standing alone, demonstrates the kind of relationship between defendant and plaintiff that could establish statutory seller status.

Id. This was true even though the complaint conclusorily alleged that each defendant "solicited" the purchase. The court stated that "a court must take all well-pleaded facts as true, but it need not credit a complaint's bald assertions or legal conclusions. . . . Here it is undisputed that the public offering was conducted pursuant to a firm commitment underwriting, and plaintiffs' bald and factually unsupported allegation that the issuer and individual officers of the issuer 'solicited' plaintiffs' securities purchases is not, standing alone, sufficient." Id.; see also Central Laborers Pension Fund v. Merix Corp., No. CV04-826-MO, 2005 WL 2244072, at *6 (D. Or. Sept. 15, 2005).

Nor do the Complaint's allegations that unnamed "senior managers" participated in a "road show" suffice to state a section 12(a)(2) claim against Converium. (Compl. ¶ 90.) "Virtually all issuers routinely promote a new issue, if only in the form of preparing a prospectus and conducting a road show." Lone Star Ladies Inv. Club v. Schlotzsky's Inc., 238 F.3d 363, 370 (5th Cir. 2001). Moreover, there is no allegation that any of the Plaintiffs were present at any roadshows attended by these unnamed "senior managers."

Here, the failure of Plaintiff to allege that Converium meets the second prong of the Pinter test is even more evident than in the usual firm commitment underwriting. Converium

did not sell its stock to the underwriters; ZFS did. (Bodkin Aff., Ex. 2 at 191.) Converium was not motivated by a desire to serve its own financial interests, as it did not stand to receive any proceeds from the offering. (Id. at 10.)

Finally, Capri v. Murphy, 856 F.2d 473 (2d Cir. 1988) is not to the contrary. There, the court held only that two general partners of an issuer were "sellers" because they had prepared and circulated the prospectus to prospective purchasers, and had directed others' promotional efforts. None of the factual circumstances present before the Second Circuit in Capri are present here.[24]

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

Even if the Complaint did adequately allege a material misrepresentation, Plaintiffs' Securities Act claims must still be dismissed because investors were on "inquiry notice" of the matters identified in the Complaint more than one year prior to the commencement of the first of these actions. Consequently, these claims are time-barred.

1. Securities Act Claims Must Be Brought Within One Year After Plaintiffs Are On Inquiry Notice.[25]

The statute of limitations with respect to Securities Act claims is set forth in Section 13 thereof, which provides:

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[24] Defendants recognize that some courts within this District have held that a person who signs a registration statement may be deemed for purposes of a motion to dismiss to have solicited the purchase of the offered securities. See Steed Fin. LDC v. Nomura Sec. Int'l, Inc., No. 00 CIV. 8058, 2001 WL 1111508, at *7 (S.D.N.Y. Sep. 20, 2001). However, these cases should not control here in light of the reasoning in the Third and Fifth Circuit decisions discussed above, nor in light of the fact that Converium did not sell its shares to the underwriters and did not receive the proceeds.

[25] It is entirely appropriate to consider the issue of whether a plaintiff had notice of facts sufficient to trigger a duty to inquire at the motion to dismiss stage where, as here, such facts can be "gleaned from the complaint and papers integral" to it. In re Enter. Mortgage Acceptance Co., LLC, Secs. Litig., 391 F.3d 401, 411 (2d Cir. 2004) (holding that plaintiff's argument that whether investor was on inquiry notice was a question of fact for the jury was "without merit"); Dodds v. Cigna Secs., Inc., 12 F.3d 346, 352 n.3 (S.D.N.Y 1993) (citing cases).

> No action shall be maintained to enforce any liability created under section 11 or section 12(a)(2) . . . unless brought within one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence. . . . In no event shall any such action be brought to enforce a liability created under section 11 or section 12(a)(1) . . . more than three years after the security was bona fide offered to the public. . . .

15 U.S.C. § 77m (emphasis added); see also Dodds v. Cigna Sec., Inc., 12 F.3d 346, 350 n.1 (2d Cir. 1993) ("Since Section 15 merely creates a derivative liability for violations of Sections 11 and 12, Section 13 applies to it as well."). A plaintiff is on inquiry notice when she "obtains actual knowledge of the facts giving rise to the action or notice of the facts, which in the exercise of reasonable diligence, would have led to actual knowledge." LC Capital Partners v. Frontier Ins. Group, Inc., 318 F.3d 148, 154 (2d Cir. 2003) (emphasis in original) (citing and quoting Kahn v. Kohlberg, Kravis, Roberts & Co., 970 F.2d 1030, 1042 (2d Cir. 1992)). Under this "constructive or inquiry notice" rule, "when the circumstances would suggest to an investor of ordinary intelligence the probability that she has been defrauded, a duty of inquiry arises." Id. (citing and quoting Dodds v. Cigna Sec., Inc., 12 F.3d 346, 350 (2d Cir. 1993)); see also Jackson Nat'l Life Ins. Co. v. Merrill Lynch & Co., Inc. 32 F.3d 697, 700-01 (2d. Cir. 1994). Such circumstances often are analogized to "storm warnings." Id.

A plaintiff need only be aware of "facts forming [the] basis of [his] cause of action . . . [,] not . . . [the] cause of action itself," to be charged with inquiry notice. Jensen v. Snellings, 841 F.2d 600, 606 (5th Cir. 1988) (internal quotation marks omitted). If, after having been exposed to storm warnings, "the investor makes no inquiry . . ., knowledge will be imputed as of the date the duty arose." LC Capital, 318 F.3d at 154 (citations omitted). Once she has been exposed to a storm warning, a plaintiff must act expeditiously. The statute of limitations will not be tolled for a plaintiff's leisurely discovery of the full details of the alleged

misrepresentations; to the contrary, it is settled that even partial disclosure of facts supporting a probability of a claim is all that is required to put an investor on inquiry notice. See id.

2. *Plaintiffs Were On Inquiry Notice Of The Alleged Misrepresentations No Later Than November 2002.*

The Prospectus disclosed that Converium had strengthened reserves in both 2000 and 2001. In particular, that document stated that "[i]n 2000, Converium group strengthened reserves by $65.4 million," and that in 2001 its reserves were further strengthened "in the amount of $112 million." (Bodkin Aff., Ex. 2 at F-23, 123.) Thereafter, in the eleven months following the IPO, the Company announced no less than four reserve strengthenings. Specifically, it disclosed a reserve increase on May 23, 2002 of $11.6 million (see Bodkin Aff., Ex. 8 at 47); a "$24.4 million provision for net adverse loss development" on July 29, 2002 (see Bodkin Aff., Ex. 9 at 11); a $59.6 million provision for net reserve development on October 28, 2002 (see Compl. ¶ 160; see also Bodkin Aff., Ex. 20); and a reserving charge of $70.3 million on November 19, 2002 (see Bodkin Aff., Ex 10 at 1). In total, then, the Company announced reserve strengthenings of $165.9 million in 2002.[26] This amounts to over two-thirds of the alleged carried deficiency of $225 million that Plaintiffs claim existed at the time of the IPO and which, if announced, purportedly would have precluded the successful completion of the IPO. (See Compl. ¶ 84.)

The Complaint makes clear that the market reacted negatively to this information. Indeed, Plaintiffs allege that the October 28 press release "caused the price of Converium's stock

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

and ADSs to fall dramatically." (Compl. ¶¶ 158, 164.) Not surprisingly, Moody's, Standard & Poor's, and Fitch Ratings downgraded their outlooks for Converium. (Bodkin Aff., Ex. 11-13.)

Such announcements of significant reserve charges, coupled with a drop in stock price, have been held to constitute storm warnings sufficient to trigger inquiry notice by shareholders of insurance companies. See, e.g., LC Capital, 318 F.3d at 156 (reserve charges taken by an insurer between 1994 and 1998 put plaintiffs on notice of probable wrongdoing more than a year before their complaint was filed). Indeed, reserve charges amounting to far less than those announced by Converium have been found to put plaintiffs on inquiry notice[27] and to start the running of the statute of limitations. Id. at 155. In LC Capital, for example, the Second Circuit affirmed that three reserving charges of only $196.5 million over a period of four years was sufficient to constitute storm warnings. Id. Converium disclosed increases in an amount equivalent to this in only eleven months. And, here, the action of rating agencies downgrading their outlook for Converium made those storm warnings that much clearer. (See Bodkin Aff., Exs. 11-13; see also Ezra Charitable Trust v. Frontier Ins. Group, Inc., No. 00 Civ. 5361, 2002 WL 87723, at *4 (S.D.N.Y. Jan. 23, 2002), aff'd sub nom. LC Capital Partners, LP v. Frontier Ins. Group, Inc., 318 F.3d 148 (2d Cir. 2003).)

This Court need not rely solely on the objective evidence of storm warnings reflected by Converium's publicly disclosed reserve strengthenings and the resulting rating agency downgrades and stock drop, however. Plaintiffs explicitly concede that by the time of the October 28, 2002 press release they believed that Converium had made "partial disclosures" of the truth about [its] financial condition. As stated in Plaintiffs' correspondence to the Court:

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[27] The fact that Defendants vigorously contest all allegations of fraud does not negate Plaintiffs' duty of inquiry. In re Merrill Lynch & Co., Inc. Research Reports Sec. Litig., 289 F. Supp. 2d 416, 425 (S.D.N.Y. 2003) ("[A] plaintiff's duty to inquire is not dissipated merely because of a defendant's later refusal to acknowledge or own up to the alleged fraud." (citations omitted)).

> [I]n an October 28, 2002 press release, Converium disclosed that it would need to strengthen its reserves to resolve a reserve deficiency in North America related to the 1997-2000 policy years. The price of Converium's stock and ADSs fell in response to that disclosure. LASERS sold 16,800 ADSs on October 30 and sold an additional 21,900 ADSs between November 1 and November 8. Thus, LASERS sold more than a third of the ADSs purchased on the IPO at a loss following the partial disclosure of Converium's true reserve position, which was misrepresented in the registration statement and prospectus.

(Bodkin Aff., Ex. 14 at 2 (emphasis added).) The partial disclosure to which Plaintiffs refer put them on inquiry notice and required them to commence a prompt inquiry. See LC Capital, 318 F.3d at 154. Plaintiffs have not alleged that they did so.

Moreover, Plaintiffs are not relieved of their duty of inquiry because positive or encouraging statements may have been made in conjunction with these reserving announcements. See LC Capital, 318 F.3d at 155; In re JWP Inc. Sec. Litig., 928 F. Supp. 1239, 1250 (S.D.N.Y. 1996). "When an investor has received information that places her on inquiry notice, she is not relieved of her duty of inquiry because management contemporaneously makes reassuring statements." In re JWP Inc. Sec. Litig., 928 F. Supp. at 1248. Statements such as those Plaintiffs identify here are mere "expressions of hope" and are insufficient to relieve Plaintiffs of their duty. (Compl. ¶¶ 199-201); LC Capital Partners, LP, 318 F.3d at 156.

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

C. The Complaint Fails To Allege A Controlling Person Claim Against The Officer Defendants And Defendants Colombo, Mehl, Förterer, Schnyder, Hendrix And Parker.

Plaintiffs allege that the Officer Defendants and Defendants Colombo, Mehl, Förterer, Schnyder, Hendrix and Parker were controlling persons of the Company within the

meaning of Section 15 of the Securities Act (15 U.S.C. § 77o) and are therefore liable for Converium's alleged underlying Section 11 and Section 12(a)(2) violations. (Compl. ¶¶ 281, 283.) To state a claim under Section 15, Plaintiffs must allege: "(i) an underlying primary violation of the securities laws by the controlled person; (ii) control over the controlled person; and (iii) particularized facts as to the controlling person's culpable participation in the violation of the controlled person." Demaria v. Andersen, 153 F. Supp. 2d 300, 314 (S.D.N.Y. 2001); see also Ellison v. Am. Image Motor Co., Inc., 36 F. Supp. 2d 628, 637-38 (S.D.N.Y. 1999) (applying the same test to Securities Act § 15 claims and Exchange Act § 20(a) claims).

As shown above, Plaintiffs do not state Securities Act claims against Converium, and even if they did, such claims would be time-barred. Therefore, a controlling person claim against the Officer Defendants and Defendants Colombo, Mehl, Förterer, Schnyder, Hendrix and Parker cannot lie.

That said, even if a primary violation were adequately alleged and not time-barred, Plaintiffs' controlling person claims still fail because the Complaint does not allege that any Individual Defendant culpably participated in the conduct giving rise to these claims. To adequately allege culpable participation, "[t]he controlling person's role must be stated with particularity and give rise to an inference of scienter—that is, there must be a strong reason to believe that the controlling person either knew or should have known that the controlled person was committing fraud." Shanahan v. Vallat, 03 Civ. 3496, 2004 WL 2937805, at *5 (S.D.N.Y. Dec. 19, 2004) (discussing "culpable participation" in the § 20(a) context); In re Geopharma, Inc. Sec. Litig., 04 Civ. 9463, 2005 WL 2431518, at *12 (S.D.N.Y. Sep. 30, 2005) ("as plaintiffs have failed to adequately plead scienter, the control person allegations are dismissed").

Here, the Complaint not only fails to allege that the Company's outside director defendants Colombo, Mehl, Förterer, Schnyder, Hendrix and Parker were "culpable participants" in Converium's alleged Securities Act violations, but it explicitly disclaims even the possibility of such being the case, stating that "Plaintiffs do not allege that [these defendants] had scienter or fraudulent intent. . . ." (Compl. ¶ 282.) Indeed, the only allegation pertaining in any way to these individuals' purported knowledge is the conclusory assertion that they "had access to and/or received direct presentations of the results of the Tillinghast study, among other information regarding the true state of the Company's reserve deficiency." (Compl. ¶ 314.) This allegation is insufficient on its face.

The allegation that the outside directors had "access to" the Tillinghast study is clearly insufficient to show culpable participation because "access to" the Tillinghast study is not the same as knowledge of its content. Moreover, even if allegations of access were enough, there are no particularized allegations providing the basis for this purported access. Similarly, the allegations that the outside directors "received direct presentations" of the Tillinghast study is deficient because it fails to include any particularized facts reflecting when or where these presentations took place and is contrary to the specific allegation that the Tillinghast study was presented only to defendants Lohmann, Kauer and Smith. (Compl. ¶ 82). In any event, as discussed below at 47-48, the final Tillinghast report supported the reserve levels in the Offering Documents and provides no basis for a finding of scienter here.

The Complaint likewise fails to allege that Defendants Lohmann, Kauer and Smith were "culpable participants" in Converium's alleged Securities Act violations. Again, the Complaint specifically disavows any allegation of scienter in support of its Section 15 claim against these individuals. (See Compl. ¶ 282 ("Plaintiffs do not allege that . . . the Officer

Defendants' liability under this Count arises from any scienter or fraudulent intent. . . .").) Plaintiffs base their culpable participation argument against the Officer Defendants on those Defendants' alleged receipt of the Tillinghast study. As set forth above, however, the Company's reserves were consistent with Tillinghast's estimates and knowledge of that fact could not support a claim of culpable participation.

In sum, the Section 15 claims against the Officer Defendants as well as against Defendants Colombo, Mehl, Förterer, Schnyder, Hendrix and Parker must be dismissed.

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

Plaintiffs allege that Converium and the Officer Defendants violated Section 10(b) of the Exchange Act (15 U.S.C. § 78j(b)) and Rule 10b-5 (17 C.F.R. § 240.10b-5) promulgated thereunder and that the Officer Defendants and Defendants Colombo, Mehl, Förterer, Schnyder, Hendrix and Parker are liable as controlling persons under Section 20(a) of the Exchange Act (15 U.S.C. § 78t(a)). All of the Exchange Act claims must be dismissed.

To state a claim under Rule 10b-5, a plaintiff must allege that "in connection with the purchase or sale of securities, the defendant, acting with scienter, made a false material representation or omitted to disclose material information and that plaintiff's reliance on defendant's action caused [plaintiff] injury." Chill v. Gen. Elec. Co., 101 F.3d 263, 266 (2d Cir. 1996) (quoting Acito v. IMCERA Group, Inc., 47 F.3d 47, 52 (2d Cir. 1995)). The scienter element may be established in either of two ways: "either (a) by alleging facts to show that defendants had both motive and opportunity to commit fraud, or (b) by alleging facts that constitute strong circumstantial evidence of conscious misbehavior or recklessness." Chill, 101 F.3d at 267 (quoting Shields v. Citytrust Bancorp, Inc., 25 F.3d 1124, 1128 (2d Cir. 1994)). Recklessness "is at the least, conduct which is highly unreasonable and which represents an

extreme departure from the standards of ordinary care to the extent that the danger was either known to the defendant or so obvious that the defendant must have been aware of it." In re Carter-Wallace, Inc. Sec. Litig., 220 F.3d 36, 39 (2d Cir. 2000) (citing Rolf v. Blyth, Eastman Dillon & Co., 570 F.2d 38, 47 (2d Cir. 1978)) (internal quotations omitted). Furthermore, "[f]raud by hindsight" has universally been held to be an insufficient basis on which to infer scienter. See Shields, 25 F.3d at 1128 (holding that allegations of fraud by hindsight failed to plead reckless behavior); In re Carter-Wallace, 220 F.3d at 42 (same).

Securities fraud claims are subject to stringent pleading requirements imposed by the Private Securities Litigation Reform Act (the "PSLRA"). Pub. L. No. 104-67, 109 Stat. 737 (codified at 15 U.S.C. §§ 77k, 77l, 77z-1, 77z-2, 78a, 78j-1, 78t, 78u, 78u-4, 78u-5). This amendment to the Exchange Act was prompted by concern that private plaintiffs were filing securities fraud actions of dubious merit in order to extract large settlement recoveries. See H.R. Conf. Rep. No. 104-369, at 31 (1995) (noting "significant evidence of abuse in private securities lawsuits," including "the routine filing of lawsuits against issuers of securities and others whenever there is a significant change in an issuer's stock price, without regard to any underlying culpability of the issuer," and "the abuse of the discovery process to impose costs so burdensome that it is often economical for the victimized party to settle").

To state a claim under the Exchange Act, a complaint must now "specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and

belief, the complaint shall state with particularity all facts on which that belief is formed." 15 U.S.C. § 78u-4(b)(1).[28]

Under the PSLRA, securities fraud plaintiffs are also required to "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." 15 U.S.C. § 78u-4(b)(2); see also Shields, 25 F.3d at 1128. A strong inference of scienter must be alleged separately as to *each defendant.* In re Merrill Lynch & Co. Research Reports Secs. Litig., 272 F. Supp. 2d 243, 262 (S.D.N.Y. 2003) ("[T]o establish scienter in misrepresentation cases, facts must be alleged which particularize how and why *each defendant* actually knew, or was reckless in not knowing, that the statements were false at the time made . . . .") (alteration and emphasis in original). There is no such thing as a group pleading of scienter. In re AFC Enters., Inc. Sec. Litig., 348 F. Supp. 2d 1363, 1371 (N.D. Ga. 2004) ("It is important to note that the group pleading doctrine allows attribution of statements to individual defendants; it has no application to the determination of scienter as to individual defendants.").

As explained below, Plaintiffs do not allege with particularity facts giving rise to a strong inference that any material misrepresentation or omission was made with scienter.

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

1. The Complaint Fails to Allege That Defendants Had Motive To Commit Fraud.

The Complaint does not allege that any of the Officer Defendants sold a single Converium share or ADS during the putative class period. Instead, the Complaint attempts to cobble together a motive for securities fraud by alleging that, by "understating Converium's

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[28] Complaints purporting to allege securities fraud must also satisfy the heightened pleading standards of Rule 9(b) of the Federal Rules of Civil Procedure, which provides that "circumstances constituting fraud or mistake shall be stated with particularity." See Kalnit v. Eichler, 264 F.3d 131, 138 (2d Cir. 2001).

reserves, the Company and the Officer Defendants were able to: (a) conduct the Converium IPO; (b) inflate the Company's financial results; (c) prevent a downgrade of the Company's credit rating; and (d) preclude the termination clauses in Converium's reinsurance agreements from being triggered." (Compl. ¶ 304.)

It is well settled in this Circuit, however, that motives such as these—which are generally held by corporate officers the world over—do not suggest fraud. See Shields, 25 F.3d at 1130 (holding that "a plaintiff must do more than merely charge that executives aim to prolong the benefits of the positions they hold"); White v. H&R Block, Inc., No. 02 Civ. 8965(MBM), 2004 WL 1698628, at *8 (S.D.N.Y. July 28, 2004) (holding that allegations of a desire to "produce the appearance of prospering performance and financial results" were insufficient to establish motive) (internal quotes omitted); San Leandro Emergency Med. Group Profit Sharing Plan v. Philip Morris Cos., 75 F.3d 801, 814 (2d Cir. 1996) ("We do not agree that a company's desire to maintain a high bond or credit rating qualifies as a sufficient motive for fraud in these circumstances, because [i]f scienter could be pleaded on that basis alone, virtually every company in the United States that experiences a downturn in stock price could be forced to defend securities fraud actions.") (internal quotations omitted); Melder v. Morris, 27 F.3d 1097, 1102 (5th Cir. 1994) (holding that allegations of desire to have successful IPO were insufficient to establish motive).

Plaintiffs also allege that "a significant portion" of the Officer Defendants' compensation came from a "variable bonus pool," the size of which was determined by the Company's share price. (Compl. ¶ 305.) This, too, however, is clearly insufficient to establish motive to commit securities fraud. See Rombach v. Chang, 355 F.3d 164, 177 (2d Cir. 2004) ("Even if the complaint is read to say that defendants artificially inflated Family Golf's stock

price to increase their personal compensation . . . [it] would still fail to allege the requisite motive: 'If scienter could be pleaded on that basis alone, virtually every company in the United States that experiences a downturn in stock price could be forced to defend securities fraud actions.'") (quoting Acito, 47 F.3d at 54); see also Shields, 25 F.3d at 1130 (rejecting allegations of motive based on charges of economic self-interest, stating "[i]t is hard to see what benefits accrue from a short respite from an inevitable day of reckoning").

In short, none of the purported motive allegations is sufficient.

2. *The Complaint Fails To Allege That Any Misleading Statement Or Omission Was Made As A Result Of Conscious Behavior or Recklessness.*

Absent allegations of motive and opportunity, the Complaint must allege particularized facts reflecting "strong circumstantial evidence [that any material misrepresentation or omission resulted from] conscious misbehavior or recklessness." Acito, 47 F.3d at 52 (citation omitted). In such instances, "the strength of [Plaintiffs'] circumstantial allegations must be correspondingly greater." Beck v. Mfrs. Hanover Trust Co., 820 F.2d 46, 50 (2d Cir. 1987); Kalnit v. Eichler, 264 F.3d 131, 142 (2d Cir. 2001) ("Where motive is not apparent, it is still possible to plead scienter by identifying circumstances indicating conscious behavior by the defendant, though the strength of the circumstantial allegations must be correspondingly greater.") (internal quotations omitted). The Complaint, therefore, must allege particularized facts from which a strong inference can be drawn that Defendants had "a state of mind approximating actual intent, and not merely a heightened form of negligence." Fadem v. Ford Motor Co., 352 F. Supp. 2d 501, 517 (S.D.N.Y. 2005) (internal quotation marks and citation omitted); Rombach, 355 F.3d at 176 (quoting Shields, 355 F.3d at 175).

Its bulk notwithstanding, the Complaint does not satisfy this standard.

a. Loss Reserve Studies

The Complaint first seeks to plead scienter by alleging that the results of various internal actuarial reserve studies demonstrated that the Company was under-reserved. (Compl. ¶¶ 58, 59, 76, 77, 78, 100, 101, 299(c), 299(f), 299(l), 299(p), 301(c), 301(d), 301(j), 302(c), 302(d), 302(i), 303(c), 303(f).) For example, the Complaint alleges that a "Loss Reserve Study" was prepared quarterly and yearly and identifies "other internal studies," prepared "regularly." (Compl ¶¶ 59, 101.) At least one of these Loss Reserve Studies purportedly "showed a significant [though unidentified] reserve deficiency at Zurich Re (North America). . . ." (Compl. ¶ 77.) Information contained in the Loss Reserve Studies is alleged to have been shared with the Officer Defendants at various, but unidentified, "meetings" and the Officer Defendants are alleged to have shared the information with other unidentified members of "the Company's senior management." (Compl. ¶ 58.)

Claims like these, where senior level executives are alleged to have "received unidentified daily, weekly and monthly financial reports that apprized [sic] them of the company's true financial status," are insufficient to raise a strong inference of conscious behavior or recklessness. Abrams v. Baker Hughes Inc., 292 F.3d 424, 431-32 (5th Cir. 2002). Indeed, Plaintiffs here provide no specifics pertaining to who prepared the "Loss Reserve Studies" at issue, when they were completed, what reserving figures were reflected in the results, what, if anything, was said in regard to these studies at the meetings where they were purportedly discussed or who attended such meetings.

Plaintiffs' allegations as to the studies prepared by Confidential Witness No. 2 fare no better. (See Compl. ¶ 74.) Again, Plaintiffs give no real indication as to the substantive content of these reports. Instead, Plaintiffs vaguely assert that Confidential Witness No. 2's "estimates as to the reserves needed to cover [years 1998-1999] consistently increased." (Id.)

Such "unsupported general claim[s] of the existence of . . . company . . . reports [containing adverse information] . . . [are] insufficient to survive a motion to dismiss." San Leandro, 75 F.3d at 812. Even presuming the relevance of these unnamed and undated reports relating to the years 1998 and 1999, then, these allegations do not give rise to an inference of scienter. See Abrams, 292 F.3d at 432.

b. The Tillinghast Report and the Deloitte Study

The cornerstones of Plaintiffs' scienter argument are the alleged preliminary conclusions of reserving studies conducted by Tillinghast in 2001 and by Deloitte in 2003. (Compl. ¶¶ 80-87, 108-122.) The preliminary conclusions of these consultants, superceded by later final reports, plainly do not show Defendants' knowledge that the reserves were wrong.

As an initial matter, Plaintiffs do not challenge the qualifications, reputation or integrity of Tillinghast or Deloitte; nor do they suggest that the data provided to either entity by the Company was manipulated or incomplete. Plaintiffs further admit that both the Tillinghast and Deloitte studies were commissioned in good faith. (See Compl. ¶ 81 (noting that, in anticipation of the IPO, ZFS sought to "obtain an accurate, independent and unbiased estimate of Zurich Re (North America)'s reserve deficienc[ies]. . . ."); Compl. ¶ 108 (Converium's Board of Directors, "concerned that the Company was not adequately reserved, wanted to obtain an independent study of the Company's reserve position.").) Such facts go a long way in undermining Plaintiffs' claim of scienter. See Krouner v. Am. Heritage Fund, Inc., No. 94 Civ. 7213(WK), 1997 WL 452021, at *4 (S.D.N.Y. Aug. 6, 1997) (dismissing claims where paragraph in complaint undercuts inference of fraudulent intent).

Plaintiffs' attempt to cast doubt on the final Tillinghast report—which completely undercuts Plaintiffs' scienter claim—by alleging that the final estimates were derived following discussions with Converium's actuaries fails. (Compl. ¶ 86.) While Plaintiffs make vague

allegations that "we pulled out every stop" and "worked them to death to get the numbers down," they have in reality alleged nothing that was improper about this dialogue. They have not alleged that Tillinghast was threatened or promised anything to change its initial estimates, abdicated its responsibilities in any way, or rendered a report that was knowingly inaccurate. Indeed, Plaintiffs have not accused Tillinghast of any impropriety or even alleged that any of the Officer Defendants doubted the conclusion proffered in Tillinghast's final report.[29]

With respect to Deloitte, the Complaint alleges that a "preliminary" analysis estimated a reserve deficiency at CRNA of $437 million. (Compl. ¶ 114.) However, the Complaint does not explain how this figure could have been material given the fact that it reflected Deloitte's preliminary work and was lowered to $172 million in Deloitte's final report, See also infra at 26-27 (discussing the immateriality of the alleged preliminary Tillinghast estimate). Moreover, while the Complaint alleges that the Deloitte review was "a very diligent and accurate review of all the reserves of Converium America and Converium Zurich" (Compl. ¶ 110), the Complaint completely ignores the final results of that review and relies entirely on Deloitte's preliminary estimates with respect to CRNA only. Deloitte's review of Converium's consolidated reserves found a surplus of $56 million.

Finally, the Complaint fails to allege that the preliminary Deloitte study was ever communicated to any of the Officer Defendants. For this reason as well, it provides no support for a claim of scienter.

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[29] While the Complaint alleges that, according to Confidential Witness No. 1, he, Mashitz and Rosenberg, both identified as actuaries, as well as [unidentified] "senior management" of the Company, "knew that Tillinghast's original 'best estimate' of $350 million was accurate" (Compl. ¶ 86), these allegations provide no indication as to how these individuals arrived at this conclusion, why this conclusion was more accurate than Tillinghast's final estimate, do not identify the senior management, and do not implicate the Officer Defendants.

c. The Technical Reserve

The Complaint further alleges that Converium failed to disclose the existence of $100 million maintained by ZRNA in a "technical reserve" as of the end of 2000. (Compl. ¶¶ 78-79.) A "technical reserve," according to the Complaint, is a reserve that is not assigned to a specific book of business, but is used, when needed, "to bolster reserves on a poorly performing book of business." (Compl ¶ 78.)

Plaintiffs fail to allege how the purported existence of a technical reserve, not alleged to be known to the Officer Defendants, could result in a finding of scienter. Indeed, the Complaint does not allege who was responsible for the technical reserve, how or who determined that the technical reserve was negative, whether Tillinghast failed to consider the technical reserve, or whether the technical reserve resulted in a deficiency in the Company's reported reserves given the reserve strengthening in 2001. In short, none of the details giving rise to a strong inference of scienter is provided. See Ressler v. Liz Claibourne, Inc., 75 F. Supp. 2d 43, 52 (E.D.N.Y. 1998) (finding that, to plead scienter, "a plaintiff must detail specific contemporaneous data or information known to the defendant that was inconsistent with the representation in question").

d. The Purported Adverse Loss Development After the IPO in 2001 and in 2002

Plaintiffs next allege that Converium experienced "up to" $80 million in "adverse loss development" at its North American operations in the 20 days after the IPO and "up to" $50 million in further adverse loss development in each quarter of 2002. (Compl. ¶ 103.) These developments were supposedly reported to Defendants Lohmann and Kauer. (Compl. ¶ 105.) The Complaint does not allege how this adverse loss development was determined, by whom it was determined or when it was supposedly reported to Lohmann and Kauer. Such conclusory

allegations are insufficient to support a finding of scienter. See In re NBTY, Inc. Sec. Litig., 224 F. Supp. 2d 482, 492 (E.D.N.Y. 2002) (dismissing complaint because "alleged adverse trend in the within complaint and its purported basis is conclusory and cannot support a securities fraud cause of action."). Indeed, allegations that there was adverse loss development "up to" amounts certain do not in fact state even the approximate amount of purported adverse development and do not provide a factual basis from which any inference of scienter can be drawn: such allegations are simply too vague. See Brandt v. Nussen, No. 03 Civ. 3697, 2003 WL 22208382, at *1 (S.D.N.Y. Sept. 23, 2003) ("where the allegations of a complaint are so vague or ambiguous . . . that they fail to give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests, the complaint must also be dismissed.") (internal quotations omitted).

In any event, the Company's public disclosures and the Complaint itself demonstrate that Converium in fact strengthened its reserves substantially in 2002. (See supra at 36.) These strengthenings totaled over $160 million. (Id.) Plaintiffs acknowledged that when a significant part of the strengthening was announced in October 2002, it sent the Company's stock "tumbling." (Compl. ¶ 164.) This is hardly consistent with allegations that the Officer Defendants sought to hide adverse loss development.

Plaintiffs next allege that even with these reserve increases during 2002, the Company was substantially under-reserved at year-end. (Compl. ¶ 107.) The Complaint bases this allegation on a comparison to yet another preliminary reserve estimate, this one purportedly initiated by Jean-Claude Jacob. (Id.) Plaintiffs refer to an e-mail allegedly authored by Mr. Jacob that states "net loss reserves as at 4Q02 were US $268M below Group Corporate Actuarial (GCA) preliminary estimate." (Id.) The Complaint does not allege when this internal study was

completed, when the e-mail depicting its results was sent, whether the preliminary estimate was ever finalized or what the results of that final estimate were. Nor does it allege any facts that would show that a GCA preliminary estimate that is the source of comparison was a tool relied on in order to set reserve estimates. And notably, as set forth above, the Deloitte review of the Company's December 31, 2002 reserves concluded that there was a surplus of $56 million, a fact that the Complaint attempts to ignore completely.

e. The Alleged Adverse Loss Development in 2003

Having alleged, contrary to the Deloitte report, that the Company was under-reserved by $437 million as of December 31, 2002, the Complaint claims that CRNA experienced further adverse loss development during the first half of 2003 of $339.9 million, bringing the total reserve deficiency to an "astounding" $776.9 million by June 30, 2003. (Compl. ¶ 122.) These allegations are textbook examples of the type of pleading that the PSLRA was designed to prohibit: the allegations are based on references to "internal Company documents" without any identification of the author, recipients or date and clearly lack sufficient specificity. See Dalarne Partners, Ltd. v. Sync Research, Inc., 103 F. Supp. 2d 1209, 1213 (C.D. Cal. 2000) (holding that no inference of scienter was raised by allegations of reports where authors were identified only as "seven or eight-person sales staff," recipients merely as "management" and contents "as a comparison between actual and projected sales") (internal quotation omitted); Leventhal v. Tow, 48 F. Supp. 2d 104, 113 (D. Conn. 1999) (dismissing complaint for lack of scienter where it failed to identify the authors and recipients of the internal documents with the requisite particularity.).

Further, although the Complaint is far from clear on this point, these allegations appear also to be based on another "internal Converium document" that compares "loss development predicted by Deloitte for the first half of 2003 with the actual loss development

experienced by Converium North America during that period." (Compl. ¶ 121.) Again, the Complaint does not identify the date, the author or the recipients of this document. Nor does it identify the Deloitte analysis that is referenced. Notably, the Complaint does not even allege that any of the Officer Defendants received any of these documents.

Finally, Defendants note that the vagueness of these allegations is compounded by the Complaint's use of the terms "adverse loss development," "additional loss development" and "total loss development" interchangeably, without explanation as to what these different terms mean. Even as alleged, the most this "internal Converium document" shows is that the loss development that developed in the ordinary course during the first half of 2003 was in line with what one would expect based on the overall reserve status of CRNA at the time. There is nothing untoward or unusual about this.

f. Actions Purportedly Taken to Hide the Alleged Reserve Deficiency

Plaintiffs next allege that the Company and the Officer Defendants took certain affirmative actions for the purpose of concealing reserve deficiencies. But there is nothing improper about the actions described, and they do not become improper simply because Plaintiffs characterize them as "schemes."

Plaintiffs allege that after the second quarter of 2003 Converium began reporting by line of business rather than geographic segment in order to hide the deficiency at Converium North America. (Compl. ¶ 126.) The Complaint itself makes clear that this decision was not kept "secret." The Company's October 3, 2003 press release specifically disclosed this change in reporting structure and investors knew that the Company would thereafter no longer be reporting the results of CRNA separately. (Compl. ¶ 187.) Further, the Complaint does not allege that there is any SEC rule requiring the Company to report reserves on a geographical

segment basis and, although Plaintiffs seem to insinuate that Converium's reporting structure does not comply with SFAS 131 (see Compl. ¶ 227), that is simply not the case. SFAS 131 does not require that companies report by geographic segment:

> An enterprise might meet the objective [of this section] by providing complete sets of financial statements that are disaggregated in several different ways, for example, by geography, by legal entity, or by type of customer. However, it is not feasible to provide all of that information in every set of financial statements. This Statement requires that general-purpose financial statements include selected information reported on a single basis of segmentation.

SFAS 131(4).

Plaintiffs also allege that the Company's novation of various reinsurance treaties in 2003 from the North American entity to the European entities was designed to conceal the condition of the North American entity. (Compl. ¶¶ 123, 128, 129, 130, 132.) But the Complaint does not and cannot allege that the novations affected Converium's overall reserves, balance sheet or income statement in any way. It simply moved reserves from one branch of the firm to another. Moreover, as discussed above at 16-17, the novations were both reported to and approved by insurance regulators from the State of Connecticut as well as identified in the Company's 2003 Form 20-F and in CRNA's annual statement published on May 27, 2004. (See (Bodkin Aff., Ex. 17 at 26; Ex. 18 at F-24; Ex. 19 at 109.)

Plaintiffs additionally allege that actuaries at CRNA were instructed to "hide" or "bury" deficiencies in the reserves during the third quarter of 2003. The Complaint, however, does not implicate any of the Defendants in this alleged conduct and hence it does not support Plaintiffs' attempt to plead scienter. (Compl. ¶ 134.) See Higginbotham v. Baxter Int'l Inc., No.

04 C 4909, 2005 WL 1272271, at *8 (N.D. Ill. May 25, 2005) ("[A] senior officer or director of the corporation must have the pertinent scienter."); Smith v. Circuit City Stores, Inc., 286 F. Supp. 2d 707, 716 (E.D. Va. 2003) ("Plaintiff's scienter allegations fail for the independent reason[] that . . . [they] lump Defendants together. . . .").

g. The 2004 Disclosures

Finally, the Complaint alleges that in the second quarter of 2004 Defendant Lohmann asked Joanne Spalla to "bury" $40 million in adverse loss development (Compl. ¶¶ 204-205), which she refused to do. It is also alleged that in June 2004 Defendants Lohmann and Kauer asked Confidential Witness No. 1, Confidential Witness No. 6, and Brian Kensil to "bury another $50 million in reserve deficiencies," which they, too, refused to do. (Compl. ¶ 205.) These allegations do not allege an Exchange Act violation of any kind because, as Plaintiffs acknowledge, these purported reserve deficiencies were not buried. (Compl. ¶ 208.) Where scienter allegations are not connected to any purported misleading statement, they fail to satisfy Plaintiffs' burden under Rule 9(b) or the PSLRA. See GSC Partners CDO Fund v. Washington, 368 F.3d 228, 239 (3rd Cir. 2004) (dismissing claims where scienter allegations "cannot be connected directly to any misleading statement. . . .").

For the foregoing reasons, Plaintiffs have failed to allege a violation of Section 10(b) and Rule 10b-5.

B. Plaintiffs' Claims Under Section 20(a) Of The Securities Exchange Act Must Be Dismissed.

Plaintiffs assert controlling persons claims under Section 20(a) of the Exchange Act (15 U.S.C. § 78t(a)) against the Officer Defendants and Defendants Colombo, Mehl, Förterer, Schnyder, Hendrix and Parker. These claims, too, must be dismissed.

As with controlling person liability under Section 15 of the Securities Act, to state a claim under Section 20(a) a plaintiff must allege: (i) an underlying primary violation of the securities laws by the controlled person; (ii) control over the controlled person; and (iii) particularized facts as to the controlling person's culpable participation in the violation of the controlled person. Boguslavsky v. Kaplan, 159 F.3d 715, 720 (2d Cir. 1998); see supra at 38-39. As set forth above, Plaintiffs fail to allege a primary violation of the Exchange Act by Converium, the purported controlled person here. (Compl. ¶ 309.) As a result, all Section 20(a) claims should be dismissed.

The Section 20(a) claims also fail because they do not adequately allege that these defendants were "culpable participants" in Converium's alleged Exchange Act violations. As this Court has recognized, "culpable participation" is analogous to scienter: a plaintiff is required to plead that "there [is] a strong reason to believe that the controlling person either knew or should have known that the controlled person was committing fraud." Shanahan, 2004 WL 2937805 at *5. As to Defendants Colombo, Mehl, Förterer, Schnyder, Hendrix and Parker, "Plaintiffs do not allege that the Director Defendants . . . had scienter or fraudulent intent. . . ." (Compl. ¶ 238.) This dispenses with any possible claim of culpable participation. As discussed at 40, the Complaint does not contain any additional factual allegations adequate to save the claims against these Defendants. Similarly, Plaintiffs have failed to allege that the Officer Defendants were "culpable participants" in Converium's primary Exchange Act violations. As discussed above, the Complaint does not allege the particularized facts giving rise to the strong inference of scienter required to show "culpable participation." Thus, Plaintiffs' Section 20(a) claims must be dismissed.

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

On a Fed. R. Civ. P. 12(b)(2) motion to dismiss for lack of personal jurisdiction, the plaintiffs bears the burden of showing that the court has jurisdiction over the defendant. A plaintiff may defeat such a motion based on legally sufficient allegations of jurisdiction. In re Magnetic Audiotape Antitrust Litig., 334 F.3d 204, 207 (2d Cir. 2003); Doppelt v. Perini Corp., 01 Civ. 4398, 2002 U.S. Dist. LEXIS 4128, at *10-11 (S.D.N.Y. Mar. 12, 2002). Plaintiffs have not met their burden with respect to defendants Clarke, Colombo, Mehl, Förterer and Schnyder (the "Foreign Director Defendants"). The Complaint fails to show that the Foreign Director Defendants had sufficient "minimum contacts" with the United States to justify this Court's exercise of jurisdiction over them.

The Due Process Clause of the Fourteenth Amendment limits the power of a court to render a valid personal judgment against a nonresident defendant. World-wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980) (citation omitted). Due process requires that a court may exercise personal jurisdiction over a nonresident defendant "only so long as there exist 'minimum contacts' between the defendant and the forum State." Id., citing Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945). In order to comport with due process, "defendant's contacts with the forum State must be such that maintenance of the suit 'does not offend traditional notions of fair play and substantial justice.'" Id. (further citations and internal quotations omitted). In applying these principles, "it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." Hanson v. Denckla, 357 U.S. 235, 252 (1958). While a defendant may be fairly subjected to a court's jurisdiction where he "has acted within a state or sufficiently caused consequences there," the

defendant "must know, or have good reason to know, that his conduct will have effects in the state seeking to assert jurisdiction over him." Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326, 1341 (2d Cir. 1972).

The Complaint does not allege that any of the Foreign Director Defendants resides in the United States or has contacts sufficient to subject them to the general jurisdiction of our courts. Nor does the Complaint allege that the Foreign Director Defendants engaged in any wrongful conduct within the United States. Instead, Plaintiffs apparently purport to base jurisdiction over the Foreign Director Defendants on the ground that their alleged actions outside of the United States caused effects inside the United States.

As an initial matter, the fact that these defendants are residents of a foreign country must be weighed in the jurisdictional analysis. As the Supreme Court stated in Asahi Metal Indus. Co. v. Super. Ct. of Cal., 480 U.S. 102, 114 (1987), "[t]he unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders." Indeed, the Offering Documents themselves caution prospective investors that these foreign defendants "are not residents of the United States" and that "it may not be possible for investors to effect service of process within the United States . . . upon . . . our directors . . . or to enforce against them . . . in U.S. courts judgments obtained in those courts based on civil liability provisions of the federal securities laws of the United States." (Bodkin Aff. Ex. 2, Prospectus, at 199.)[30]

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

To the extent that Plaintiffs are indeed attempting to plead jurisdiction based on actions that purportedly had effects in the United States, the allegations in the Complaint fail to support such an argument. The Complaint does not allege that the Foreign Director Defendants engaged in any wrongful conduct that had an effect on the United States. It does not allege that the Foreign Director Defendants made misrepresentations concerning the Company's reserves or were themselves involved in any reserving activities about which Plaintiffs complain.

Nor do the Complaint's allegations concerning the Company's ADS program provide a basis for asserting personal jurisdiction over the Foreign Director Defendants. While the Complaint alleges that an ADS program was established in the United States for Converium Holding AG shares, such is not alleged to have been done at the instance of these defendants. In fact, the Complaint alleges that ZFS—not these defendants—determined to de-merge its third-party reinsurance business by means of an initial public offering focused primarily on the European market. (Compl. ¶ 88.) And, even if Converium subjected itself to personal jurisdiction through the ADS program, it is the corporate defendant that is the actor, not the individual defendants. In such circumstances, where the contacts are the result of the "unilateral activity of another party or third person," personal jurisdiction over these individuals is lacking. See Helicopteros Nacionales de Colombia v. Hall, 466 U.S. 408, 417 (1984). However, even if the Foreign Director Defendants' knowledge that ADSs would be sold in the United States could be said to make the possibility of injury here foreseeable, the Supreme Court has made clear that the foreseeability of causing injury in another jurisdiction is not a "sufficient benchmark for personal jurisdiction." World-wide Volkswagen Corp., 444 U.S. at 295; Asahi Metal Indus. Co.., 480 U.S. at 111.

Defendants and defendants Lohmann and Kauer do not waive, and hereby preserve, all rights to contest the enforceability of any such judgment.

The real crux of Plaintiffs' personal jurisdiction allegations is simply that the Foreign Director Defendants were directors, or directors-elect, of the Company at the time the Registration Statement became effective and signed the statement or consented to their inclusion in it. (Compl. ¶ 240.) The Complaint goes on conclusorily to allege that they "caused to be issued, and participated in the issuance of materially false and misleading written statements that were contained in the Registration Statement. . . ." (Id.) These sparse allegations do not support this Court's exercise of jurisdiction over the Foreign Director Defendants.

While we recognize that authority in this Circuit suggests that signing a registration statement may be considered sufficient to find personal jurisdiction over a defendant,[31] our research has not disclosed a Second Circuit or Supreme Court decision adopting such a sweeping rule. And we have found no decision holding that a director-elect's consent to have his name mentioned in a prospectus is enough, standing alone, to support personal jurisdiction under a "minimum contacts" analysis. To suggest that these actions establish that these individuals availed themselves of the privilege of doing business in the United States stretches to the breaking point "traditional notions of fair play and substantial justice." Int'l Shoe Co., 326 U.S. at 316. A rule equating the signing of a registration statement or consenting to one's name being mentioned as a director-elect, in the absence of any allegation of misconduct on the defendants' part, would violate the Due Process Clause.

In sum, there are not, on the basis of the allegations of the Complaint, sufficient grounds to support the exercise of personal jurisdiction over the Foreign Director Defendants. The Foreign Director Defendants believe that the Complaint does not establish a prima facie

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[31] See In re CINAR Corp. Secs. Litig., 186 F. Supp. 2d 279, 305-06 (E.D.N.Y. 2002).

showing of personal jurisdiction over them. They have, accordingly, preserved their Rule 12(b)(2) objection to the exercise of personal jurisdiction over them.

CONCLUSION

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

Dated: December 23, 2005
New York, New York

Respectfully submitted,

WILLKIE FARR & GALLAGHER LLP

By: 

Stephen W. Greiner (SG-4287)
Richard Mancino (RM-0352)

787 Seventh Avenue
New York, New York 10019
(212) 728-8000

Of Counsel:
Lisa C. Solbakken
Kathryn H. Bodkin
Caren Van Winkle

Attorneys for Defendant Converium Holding AG
and the Individual Defendants