UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE UBS AG SECURITIES LITIGATION	MASTER FILE NO. 1:07-CV-11225-RJS ELECTRONICALLY FILED

LEAD PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' RULE 12(b)(1) MOTION TO DISMISS FOREIGN LEAD PLAINTIFFS' CLAIMS

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TABLE OF CONTENTS

Page

PRELIMINARY STATEMENT 1

FACTUAL BACKGROUND 5

A. THE PARTIES 5

1. Plaintiffs, The Putative Class And The Composition Of UBS's Shareholder Base 5

2. Defendants 6

B. DEFENDANTS' FRAUDULENT CONDUCT IN THE UNITED STATES 8

1. Conduct Related To Mortgage-Backed Securities 8

a. Face-to-Face Analyst Conferences In New York City 8

b. Defendant Costas' False Statements To U.S. Reporters 9

c. Misconduct At Dillon Read Capital Management 9

d. Issuance Of False And Misleading Communications From And/Or Into The U.S. 10

2. Conduct Related To Auction Rate Securities 12

3. Conduct Related To U.S. Income Tax Evasion 13

4. False And Misleading SEC Filings 13

C. U.S. REGULATORS AND LAW ENFORCEMENT HAVE CHARGED UBS WITH, AND CONTINUE TO INVESTIGATE UBS FOR, FRAUD 13

ARGUMENT 15

I. DEFENDANTS' SUBJECT MATTER JURISDICTION ARGUMENTS ARE WITHOUT MERIT 15

A. THE STANDARD FOR EVALUATING SUBJECT MATTER JURISDICTION 15

B. THE APPLICABLE CONDUCT AND EFFECTS TESTS 16

C. CONTRARY TO DEFENDANTS' ARGUMENTS, WHERE, AS HERE, THE RELEVANT TESTS ARE SATISFIED, SUBJECT MATTER JURISDICTION EXISTS FOR FOREIGN PLAINTIFFS' PURCHASES OF FOREIGN SECURITIES ON FOREIGN EXCHANGES 18

1. Defendants' Material Conduct In The U.S. Satisfies The Conduct Test 18

2. The Overwhelming Effects Of Defendants' Fraudulent Conduct On U.S. Markets And Investors Satisfies The Effects Test 21

D. DEFENDANTS' HEAVY RELIANCE ON *NAB* IS MISPLACED 23

E. CONTRARY TO DEFENDANTS' ARGUMENT, WHERE, AS HERE, THE RELEVANT TESTS ARE SATISFIED, PLAINTIFFS NEED NOT DEMONSTRATE THAT "TIPPING FACTORS" WEIGH IN FAVOR OF JURISDICTION 25

1. Defendants' Assertions That Foreign Courts Would Not Give *Res Judicata* Effect To A U.S. Class Action Judgment With Respect To Absent Class Members Is Irrelevant To The Subject Matter Jurisdiction Inquiry At This Stage Of The Proceedings 26

2. There Is No Risk Of Inconsistent Adjudication With Swiss Regulators 28

II. EVEN IF ORIGINAL JURISDICTION OVER FOREIGN LEAD PLAINTIFFS' CLAIMS IS LACKING, THE COURT SHOULD EXERCISE SUPPLEMENTAL JURISDICTION OVER SUCH CLAIMS 28

CONCLUSION 30

TABLE OF AUTHORITIES

Page(s)

CASES

Alfadda v. Fenn,
935 F.2d 475 (2d Cir. 1991).....16, 20

Bersch v. Drexel Firestone, Inc.,
519 F.2d 974 (2d Cir. 1975).....19,24, 29

City of Chicago v. Int'l Coll. of Surgeons,
522 U.S. 156 (1997).....29

City of Edinburgh Council ex rel. Lothian Pension Fund v.Vodafone Group Pub. Co.,
No. 07 Civ. 9921 (PKC), 2008 WL 5062669 (S.D.N.Y. Nov. 24, 2008).....29

CL-Alexanders Laing & Cruickshank v. Goldfeld,
709 F. Supp. 472 (S.D.N.Y. 1989).....18

Cromer Fin. Ltd. v. Berger,
137 F. Supp. 2d 452 (S.D.N.Y. 2001).....16,19

Cromer Fin. Ltd. v. Berger,
205 F.R.D. 113 (S.D.N.Y. 2001) 21, 27, 28

Cromer Fin. Ltd. v. Berger,
No. 00 Civ. 2284 (DLC), 2003 WL 21436164 (S.D.N.Y. June 23, 2003) 17

Europe & Overseas Commodity Traders, S.A. v. Banque Paribas London,
147 F.3d 118 (2d Cir. 1998).....16, 17, 25

Exxon Mobil Corp. v. Allapattah Servs., Inc.,
545 U.S. 546 (2005).....29

Foman v. Davis,
371 U.S. 178 (1962).....30

Froese v. Staff,
No. 02-CV-5744 (RO), 2003 WL 21523979 (S.D.N.Y. July 7, 2003).....23

Goodyear Atomic Corp. v. Miller,
486 U.S. 174 (1988).....22

IIT v. Cornfeld,
619 F.2d 909 (2d Cir 1980).....28

In re Alstom SA Sec. Litig.,
253 F.R.D. 266 (S.D.N.Y. 2008) 27

In re Alstom SA Sec. Litig.,
406 F. Supp. 2d 346 (S.D.N.Y. 2005).....20

In re AstraZeneca Sec. Litig.,
559 F. Supp. 2d 453 (S.D.N.Y. 2008).....20

In re Bayer AG Sec. Litig.,
423 F. Supp. 2d 105 (S.D.N.Y. 2005).....20

In re Bayer AG Sec. Litig.,
No. 03 Civ. 1546 (WHP), 2004 WL 2190357 (S.D.N.Y. Sept. 30, 2004) 20

In re Gaming Lottery Sec. Litig.,
58 F. Supp. 2d 62 (S.D.N.Y. 1999).....20

In re Goodyear Tire & Rubber Co. Sec. Litig.,
No. 5:03 CV 2166, 2004 WL 3314943 (N.D. Ohio May 12, 2004) 22

In re Literary Works Elec. Databases Copyright Litig.,
509 F.3d 116 (2d Cir. 2007).....29

In re Nat'l Australia Bank Sec. Litig.,
No. 03 Civ. 6537 (BSJ), 2006 WL 3844465 (S.D.N.Y. Oct. 25, 2006) 23

In re Royal Ahold, N.V. Sec. & ERISA Litig.,
351 F. Supp. 2d 334 (D. Md. 2004) 20

In re Royal Dutch Shell Transp. Sec. Litig.,
380 F. Supp. 2d 509 (D.N.J. 2005) 20, 27

In re SCOR Holding (Switzerland) AG Litig.,
537 F. Supp.2d 556 (S.D.N.Y. 2008).....1, 23, 29

In re Vivendi Universal, S.A. Sec. Litig.,
No. 02 Civ. 5571, 2004 WL 2375830 (S.D.N.Y. Oct. 22, 2004) 16, 18

In re Yukos Oil Co. Sec. Litig.,
No. 04 Civ. 524 (WHP), 2006 WL 3026024 (S.D.N.Y. Oct. 25, 2006).....23

Inv. Props. Int'l, Ltd. v. IOS, Ltd.,
459 F.2d 705 (2d Cir. 1972).....16

Itoba Ltd. v. Lep Group PLC,
54 F.3d 118 (2d Cir. 1995)..... *passim*

Leasco Data Processing Equip. Corp. v. Maxwell,
468 F.2d 1326 (2d Cir. 1972).....19

Leonard v. Garantia Banking Ltd.,
No. 98 Civ. 4848, 1999 WL 944802 (S.D.N.Y. Oct. 19, 1999),
aff'd mem., 213 F.3d 626 (2d Cir. 2000) 15

Makarova v. U.S.,
201 F.3d 110 (2d Cir. 2000).....16

Marsden v. Select Med. Corp.,
246 F.R.D. 480 (E.D. Pa. 2007).....22

Morrison v. Nat'l Australia Bank, Ltd.,
547 F.3d 167 (2d Cir. 2008) ..... *passim*

Psimenos v. E.F. Hutton & Co.,
722 F.2d 1041 (2d Cir. 1983).....20

SEC v. Berger,
322 F.3d 187 (2d Cir 2003).....21

Semi-Tech Litig., LLC v. Bankers Trust Co.,
272 F. Supp. 2d 319 (S.D.N.Y. 2003).....16

Takeda v. Turbodyne Techs., Inc.,
67 F. Supp. 2d 1129 (C.D. Cal. 1999) 27

Wagner v. Barrick Gold Corp.,
251 F.R.D. 112 (S.D.N.Y. 2008) 19-20

STATUTES AND RULES

15 U.S.C. § 78b(2) 19

28 U.S.C. § 1331.....17

28 U.S.C. § 1367(a) 29

15 U.S.C. § 78aa 17

Fed. R. Civ. P. 15(a) 30

OTHER AUTHORITIES

Treaty of Friendship, Commerce and Consular Rights Between the United States and Germany, 44 Stat. 2132 21

General Convention of Friendship, Commerce and Navigation Between the United States of America and the Kingdom of Denmark, 8 Stat. 340 21-22

Treaty of Friendship, Commerce and Navigation Between the United States of America and the Kingdom of Denmark,12 UST 908 22

Treaty of Friendship with Switzerland, 11 Stat. 587 22

PRELIMINARY STATEMENT

Four court-appointed lead plaintiffs represent the putative class of defrauded UBS AG ("UBS" or the "Company") investors in this case.[1] The putative class is comprised of U.S. and foreign residents who purchased UBS shares on the New York Stock Exchange ("NYSE") and foreign exchanges. Defendants UBS, a Swiss bank, and certain current or former executives of UBS and/or its U.S. subsidiaries ("Defendants"), recognize that their fraudulent conduct had a substantial effect in the U.S. and, therefore, concede subject matter jurisdiction with respect to plaintiffs who are based in the U.S. or who purchased their UBS shares on the NYSE.[2] Defendants move, however, to dismiss claims brought by Foreign Plaintiffs, who are resident outside the U.S. and purchased shares on non-U.S. exchanges. Defendants claim that this Court lacks subject matter jurisdiction over Foreign Plaintiffs' claims under the Second Circuit's applicable "conduct/effects" tests. As shown below, Defendants are wrong because the conduct and effects tests are satisfied here.

Since there has been no hearing or discovery, Plaintiffs need only make a *prima facie* showing of jurisdiction with respect to Foreign Plaintiffs. Defendants implicitly concede that the Complaint (defined below) satisfies Plaintiffs' burden because they make a "factual" rather than "facial" attack on the Court's subject matter jurisdiction and, thus, rely on documents outside the Complaint to support their arguments. Defendants' arguments should be rejected because both the

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[1] The lead plaintiffs are: (1) City of Pontiac Policemen's and Firemen's Retirement System ("Pontiac"), a Michigan pension plan for U.S. residents; (2) Arbejdsmarkedets Tillægspension ("ATP"), a Denmark pension and insurance fund; (3) Union Asset Management Holding AG ("Union"), a German holding company for a large German fund manager; and (4) International Fund Management, S.A. ("IFM"), a Luxembourg, Belgium-based financial institution. Teamsters Union Local 500 Severance Fund ("Teamsters"), a U.S.-based pension fund, and the Council of the Borough of South Tyneside ("Tyneside"), an England-based pension fund, are representative plaintiffs in this action. Lead Plaintiffs, Teamsters and Tyneside are collectively referred to as "Plaintiffs." ATP, Union and IFM are sometimes referred to as "Foreign Lead Plaintiffs," or along with Tyneside, "Foreign Plaintiffs."

[2] *See* Defendants' Memorandum Of Law In Support Of Their Rule 12(b)(1) Motion To Dismiss Foreign Lead Plaintiffs' Claims (hereafter "DB") at 1, 8 & n.8; *see also In re SCOR Holding (Switzerland) AG Litig.*, 537 F. Supp. 2d 556, 561 (S.D.N.Y. 2008) (finding jurisdiction over claims of U.S. residents that purchased Swiss company's stock

Complaint and competent evidence from outside it establish that the fraud in this case took place overwhelmingly within U.S. borders and was executed primarily by employees of UBS's two main U.S. subsidiaries: Dillon Read Capital Management ("DRCM"), a U.S.-based hedge fund created to manage UBS's subprime and alternative-A ("Alt-A") mortgage-related investments in the United States, and UBS Securities LLC, UBS's U.S.-based investment banking subsidiary. Executives at DRCM and/or UBS Securities (Delaware companies based in New York City and Stamford, Connecticut, respectively) engaged in multiple schemes to: (i) conceal massive exposure to and losses in subprime mortgage-backed securities; (ii) overstate the value of a different type of security, so-called "auction rate securities" ("ARS"); and (iii) assist wealthy U.S. taxpayers in evading U.S. income taxes. These schemes had the effect of artificially inflating not only the price of UBS shares on the NYSE, but since those artificially-inflated NYSE prices were disseminated abroad and factored into the price of UBS shares on foreign exchanges, also caused artificial inflation in foreign markets. Ultimately, UBS was forced to write down more than $38 billion in overvalued mortgage-related securities and nearly $1 billion in overvalued ARS. The revelations of these overvaluations and other disclosures caused UBS's stock price to plunge on the NYSE and foreign exchanges, resulting in substantial losses for U.S. and foreign investors.

In order to determine whether to exercise jurisdiction over the claims of Foreign Plaintiffs, this Court must apply the conduct and effects tests. The conduct test examines the extent to which domestic activity played a part in causing harm overseas and is easily satisfied here. Contrary to Defendants' contentions, Plaintiffs do not challenge solely those disclosures that were issued by UBS's Swiss executives from Switzerland. Entirely separate and apart from UBS's misleading Switzerland-issued financial statements: (1) UBS itself issued a false and misleading press release

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on U.S. and foreign exchanges). Consequently, even if the Court were to conclude that it lacks jurisdiction with respect to the claims of any or all Foreign Plaintiffs, the case will continue as to a class of such U.S. plaintiffs.

from New York that fraudulently concealed its exposure to the U.S. subprime and Alt-A mortgage market; (2) certain Defendants personally made false and misleading statements *while standing on U.S. soil at investor conferences* that took place *in New York* that fraudulently concealed UBS's true subprime and Alt-A mortgage exposure; (3) a DRCM executive made false and misleading statements to the press *while he was in New York or Connecticut* that fraudulently concealed the complete inadequacy of DRCM's risk controls; (4) certain Defendants concealed the results of an internal experiment *conducted in New York or Connecticut* that would have revealed Defendants' scheme to overvalue mortgage-related assets; (5) certain Defendants concocted a scheme *while in New York or Connecticut* to conceal the overvaluation by paying phony investment returns to investors in a DRCM fund that had been set up for outside investors (the "OIF"), and those returns were paid by DRCM *from New York or Connecticut*; (6) certain Defendants fired a DRCM trader *in New York* when his actions of properly marking his mortgage-related positions *in New York* threatened to expose the scheme; (7) UBS executives *in the U.S.* engaged in a scheme to rig "Dutch auctions" held *in the U.S.* to artificially inflate the value of ARS that were sold to *more than 40,000 U.S. investors*, and then recorded the overvalued ARS on UBS's balance sheet to hide the scheme; and (8) UBS executives helped *more than 17,000 wealthy U.S. citizens* evade *U.S. income taxes* in violation of an express *agreement between UBS and the United States* requiring UBS to identify certain U.S. taxpayers and withhold U.S. income taxes. In addition, there were numerous earnings conference calls hosted by Swiss-based UBS executives during which misleading statements were broadcast into U.S. markets to U.S. analysts and investors (including instances where such calls were *exclusively* for the benefit of participants in the U.S. market). These calls constitute conduct within the U.S. for purposes of the conduct test. The conduct test, therefore, is easily satisfied.

Contrary to Defendants' contentions, the effects test also is met here. Defendants' conduct caused overwhelming effects in U.S. capital markets and on U.S. investors because, among other things discussed below: (1) almost 15% of purchases of UBS shares during the Class Period (defined below) were made on the NYSE; and (2) Defendants' conduct triggered a nationwide mobilization of criminal and civil law enforcement at the federal and state levels that resulted in: (a) UBS's payment of more than $22 billion to settle charges brought by regulators representing the federal government, in addition to all fifty states, relating to fraudulent marketing of ARS to 40,000 U.S. investors; (b) federal criminal and civil investigations regarding UBS's overvaluation of mortgage-related assets; and (c) federal criminal prosecutions relating to UBS's scheme to aid and abet U.S. income tax evaders (part of an offshore tax evasion epidemic that the U.S. Senate concluded costs law-abiding taxpayers more than $100 billion per year). In sum, as discussed below, the false and misleading statements Defendants issued in the U.S., and other U.S. conduct in which Defendants engaged, directly caused Foreign Plaintiffs' losses, and the conduct test and effects test (or an "admixture" of the two, which often "gives a better picture of whether there is sufficient United States involvement to justify the exercise of jurisdiction," *Morrison v. Nat'l Australia Bank, Ltd.,* 547 F.3d 167, 171 (2d Cir. 2008) ("*NAB*")) are satisfied. Accordingly, an assertion of jurisdiction over Foreign Plaintiffs' claims is proper.

Defendants claim the Second Circuit's recent decision in *NAB*, which declined to exercise subject matter jurisdiction over the claims of foreign purchasers of a foreign issuer's securities on foreign exchanges, is on all-fours with this case and requires the same result here. *NAB*, however, is distinguishable from this case for three reasons. First, unlike in *NAB* where foreign plaintiffs relied exclusively on the falsity of financial statements prepared in Australia by a foreign issuer in their attempt to satisfy the conduct test, *see id.* at 168-69, here the Complaint is not so limited. Indeed, numerous false statements were uttered in the United States. Second, the *NAB* plaintiffs

conceded the effects test did not apply, whereas here Plaintiffs make no such concession, and there are overwhelming effects within the U.S. that support jurisdiction. Third, in *NAB*, the Second Circuit emphasized that the lack of any viable claims by a U.S plaintiff weighed heavily against jurisdiction, while in this case there are representative U.S. plaintiffs.

Defendants further assert that even though the requisite tests are satisfied, Plaintiffs must, nonetheless, prove that additional "tipping factors" weigh in favor of asserting subject matter jurisdiction. This too is wrong because: (1) tipping factors have never been applied in a case with the level of U.S. conduct and effects present here; and (2) the specific tipping factors upon which Defendants seek to rely have never, by any court, been used to impact subject matter jurisdiction. Finally, even if the Court finds that it lacks jurisdiction as to the claims of any or all Foreign Plaintiffs, the Court has jurisdiction over the U.S. plaintiffs' claims and should exercise supplemental jurisdiction over Foreign Plaintiffs' claims for the reasons discussed below.

FACTUAL BACKGROUND

A. THE PARTIES

1. Plaintiffs, The Putative Class And The Composition Of UBS's Shareholder Base

The putative class is defined as Plaintiffs and other purchasers of UBS shares "on Worldwide exchanges, including, but not limited to, the NYSE, the Swiss Exchange ("SWX"), and the London Stock Exchange ("LSE") from February 13, 2006 to July 3, 2008, inclusive (the "Class Period")." Consolidated Securities Class Action Complaint ("Complaint"), at 1.[3]

According to information published on UBS's web site (written in English), as of December 31, 2007: (1) 19.2% of UBS's registered shares were held by "North American"

[3] Plaintiffs are entitled to present facts outside the Complaint to assist in establishing jurisdiction. *See infra* § I.A. Further, to the extent the Court has any question as to whether jurisdiction exists here, jurisdictional discovery by Plaintiffs is proper. *See id.* Hereafter, references to "¶__" are to paragraphs of the Complaint. All references to "Ex. __" are to the exhibits to the Declaration of Geoffrey C. Jarvis, dated February 4, 2009 ("Jarvis Decl.").

investors, an overwhelmingly large portion of which are highly likely to be U.S. residents given that UBS's shares are listed on the NYSE, and not on any Canadian stock exchange; (2) a U.S. resident holding 14.15% of the shares was the single largest holder of UBS shares; and (3) the next largest holder of UBS shares held just 7.99%.[4] Defendants further acknowledge that a substantial 14.6% of the purchases of UBS shares during the Class Period were made in the U.S. *See* DB at 5. Indeed, as of June 30, 2008, U.S.-based institutions held more than 50% of the total number of UBS shares held by large institutional investors.[5]

2. Defendants

Defendant UBS is a global investment banking and wealth management powerhouse. Although based in Zurich, Switzerland, UBS has extensive operations in the U.S. UBS's ordinary shares have been listed and traded on the NYSE since May 16, 2000. *See* 2007 Form 20-F, at p. 11, Ex. 1. In addition, UBS has $3.2 billion of preferred securities registered with the NYSE and other securities registered with the American Stock Exchange. *See* 2007 Form 20-F, at p. 2, Ex. 1. UBS's annual reports are distributed to shareholders in German *and English*, *see* 2007 Form 20-F, at p. 54, Ex. 1, UBS maintains investor relations hotlines in Zurich *and New York*, *see* 2007 Form

[4] *See* UBS "Capital Structure" Statistics, Ex. 2 ("DTC (Cede & Co.), New York, The Depositary Trust Company, a US securities clearing organization, was registered as a shareholder for a great number of beneficial owners with 14.15% of all shares issued as of 31 December 2007 (13.21% as of 31 December 2006)."). These percentages do not include *unregistered* shares and, therefore, the percentages of all shares (registered and unregistered) held by U.S. investors may well be much higher than what is disclosed on UBS's web site. *See id*. In addition, at year-end 2007, UBS itself owned as much as 10% of its shares. *Id.* Since the Company as holder of such shares is excluded from the Class, *see* ¶ 1083, the percentage of U.S. class members is higher than these disclosures suggest.

[5] *See* Data Compiled by Thomson Financial using filings on Securities and Exchange Commission ("SEC") Form 13-F ("TF Data"), Ex. 3. Defendants claim that the TF Data reveals that "260 U.S. institutions and 510 non-U.S. institutions held shares of UBS for a total of 770 institutional shareholders. That is, U.S. institutional holders of UBS shares comprised only about 33.8% of all institutions…." Declaration of Allen Ferrel, dated November 18, 2008 ("Ferrel Decl.") ¶ 25. But, while only about one-third of these institutions appear to be U.S. residents, they hold more than half of the *total number* of the shares held by such institutions. *See* TF Data, Ex. 3. Separately, Professor Ferrell's assertion that "it is likely…that many of the U.S. asset managers or investment advisors on the Thomson list (such as Goldman Sachs Asset Management ["Goldman"]) hold large portions of their UBS shares on behalf of foreign customers," Ferrel Decl. ¶ 24, is not based on any data or analysis and thus amounts to a mere uneducated guess. Indeed, since Goldman is a U.S. (not foreign) institution, it is more probable that the vast majority of customers are U.S. residents. Even applying Professor Ferrel's logic, foreign asset managers would hold large

20-F, at p. 56, Ex. 1, UBS has issued press releases from both Zurich *and New York*, *see infra* at 10, and about 38% of UBS employees are based in the Americas (compared to only about 33% in Switzerland). *See* UBS "Facts & Figures," Ex. 4. These key connections to the U.S. explain why UBS's operations are subject to extensive U.S. state and federal regulatory regimes relating to banking. *See* 2007 Form 20-F, at pp. 45-46, Ex. 1 (explaining regimes and noting that in bankruptcy, UBS's U.S. assets would likely be used to satisfy creditors of its U.S. branches before being available in Swiss insolvency proceedings).

During the relevant time, UBS had at least twenty-three subsidiaries incorporated in and operating throughout the U.S., more than twice as many as its eleven subsidiaries in Switzerland. *See* 2007 Form 20-F, at pp. 96-99, Ex. 1. Those subsidiaries included UBS Securities and DRCM, the two key perpetrators of fraud in this case. UBS Securities is a Delaware corporation and registered broker-dealer in the U.S. with operations in Stamford, Connecticut and New York City. ¶¶ 8, 97. UBS Securities served as UBS's investment banking arm in the U.S. and, with a related UBS subsidiary in the U.S., employed a veritable army of 8,200 financial advisors in over 480 offices scattered throughout the U.S. *See* Assurance of Discontinuance Pursuant to Executive Law § 63(15) *In The Matter of UBS Securities LLC and UBS Financial Services, Inc.* ("UBS Assurance"), ¶ 2, Ex. 5. UBS Securities' U.S.-based investment banking operations were run by Defendants Huw Jenkins (UBS Securities CEO), Ramesh Singh (Global Head of Securitized Products and Head of Debt Capital Markets Americas), David Martin (head of the Residential Mortgages, Asset-Backed Securities ("ABS") and Collateralized Debt Obligation ("CDO") businesses at UBS) and James Stehli (head of UBS's Global CDO Group). ¶¶ 106-11. (These Defendants are sometimes referred to as the "UBS Securities Executive Group.") DRCM was: (a)

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portions of their UBS shares on behalf of U.S. customers, thereby increasing – rather than decreasing – the number of shares held of behalf of U.S. investors.

a Delaware limited liability company launched in June 2006 to manage UBS's mortgage-backed asset portfolios; (b) based in New York City; and (c) run by Defendants John Costas (DRCM's CEO) and Michael Hutchins (DRCM's President). ¶¶ 110-11; State of Delaware "Entity Details" Information, Ex. 6. (Costas, Hutchins and Singh (who became a DRCM executive after Costas and Hutchins were ousted, ¶ 107, are referred to as the "DRCM Executive Group.")

B. DEFENDANTS' FRAUDULENT CONDUCT IN THE UNITED STATES

The DRCM Executive Group and/or the UBS Securities Executive Group engaged in schemes and made false and misleading statements in the U.S. to conceal the accumulation of, exposure to, and massive losses in residential-mortgage backed securities ("RMBS"), CDOs and/or ABS[6] by, among other things, deliberately overvaluing these securities. The ARS and tax evasion schemes were also executed by UBS Securities and/or other UBS subsidiaries in the U.S. ¶¶ 970-1000. UBS executives outside the U.S.:[7] (a) participated in the issuance by UBS of (i) at least one false press release from New York and (ii) false and misleading financial statements, including filings with the SEC; and/or (b) communicated directly with U.S. analysts and investors on numerous conference calls broadcast into the U.S.

1. Conduct Related To Mortgage-Backed Securities

a. Face-to-Face Analyst Conferences In New York City

On March 28, 2007, UBS held a face-to-face analyst conference in New York City during which Defendants Martin and Singh fraudulently concealed UBS's exposure to RMBS, CDOs and/or ABS. ¶¶ 594-96. Similarly, on May 14, 2007, UBS hosted its 2007 Global Financial

[6] Broadly speaking, RMBS, CDOs and ABS are securities that are backed by cash-flow streams generated primarily by borrower payments on residential mortgages. *See* ¶¶ 137-98.

[7] These executives are individual defendants Peter Wuffli (UBS's Group CEO and a member of the Group Executive Board ("GEB"), Marcel Ospel (former Chairman of UBS's Board of Directors), Marcel Rohner (who succeeded Wuffli as Group CEO and a member of the GEB), Clive Standish (former Group CFO and a member of the GEB), Marco Suter (who succeeded Standish as Group CFO and a member of the GEB) and Walter Stuerzinger (former Group Chief Risk Officer and Chief Operating Officer and a member of the GEB). *See* ¶¶ 98-105. These Defendants are sometimes referred to as "UBS Swiss-Based Executives."

Services Conference in New York City during which Defendant Jenkins: (a) misled investors about the reasons for the closure of DRCM; (b) falsely described UBS as being on the "[r]ight side of the US subprime market;" and (c) falsely represented that UBS Securities' revenue and growth initiatives remained on track. ¶ 995. These statements were false and misleading because, among other things, DRCM and UBS Securities had amassed a concentrated, illiquid subprime and Alt-A mortgage-backed asset portfolio in excess of $100 billion. ¶¶ 594-97.

b. Defendant Costas' False Statements To U.S. Reporters

While he was in Connecticut or New York, Defendant Costas made the following statements that were disseminated in a May 3, 2007 *Bloomberg News* article: "UBS is in complete control from a risk management standpoint" of DRCM's assets and "there were positions in that book [i.e., DRCM's assets] that had been established in 2001, 2002, and so there was idiosyncratic risk that was in the book." ¶¶ 631-32. These statements were false or misleading because UBS has now admitted that its risk controls were inadequate and confidential witnesses have detailed UBS's complete absence of internal reporting protocols. *Id.*

c. Misconduct At Dillon Read Capital Management

In March 2007, DRCM, and specifically Defendant Hutchins, conducted an internal experiment at its New York offices in which it concluded that its $4 billion mortgage-backed asset portfolio was overvalued by as much as 50%. This experiment was concealed from UBS's shareholders in a scheme that violated applicable accounting rules. ¶¶ 27-28.

UBS closed DRCM and the OIF in or about May 2007 and deceived investors into believing that the OIF was a success (rather than a miserable failure with massive concealed losses) by returning $1.3 billion to investors in the OIF, which had been created just six months earlier. This provided those outside investors with a hefty (but phony) 16.5% return on their investment and was done so that these outside investors and the marketplace would not discover

the truth about the OIF's and the DRCM proprietary fund's actual mortgage-related losses – losses that would have required massive write-downs of corresponding mortgage-related positions at UBS Securities under applicable accounting rules. ¶¶ 34-38.

UBS fired a DRCM trader, John Niblo, who worked in New York and wrote-down certain of DRCM's mortgage-backed holdings in April 2007 based on prevailing market prices. Niblo's firing was a scheme to avoid having to take larger write-downs at DRCM and make similar write-downs at UBS Securities that would have revealed the Company's overvaluations. ¶¶ 31-33, 805.

d. Issuance Of False And Misleading Communications From And/Or Into The U.S.

UBS issued, from and/or into the U.S., the following three press releases containing false or misleading statements. These statements were in English and were available to U.S. and foreign investors alike on UBS's web site:

- a May 3, 2007 press release issued from both Zurich **and New York** misleadingly stating that UBS closed and reintegrated DRCM into UBS Securities because managing client money alongside UBS's money "became too complex and expensive." The press release fraudulently suppressed the true reason for DRCM's closure, which was to conceal losses suffered in the DRCM proprietary portion of the fund and the OIF, along with UBS's massive exposure to the U.S. subprime and Alt-A mortgage markets through positions held by DRCM and UBS Securities. ¶¶ 598-601; May 3, 2007 Press Release, Ex. 7;
- an October 1, 2007 press release issued from Zurich and Basel, Switzerland stating that UBS's positions were "appropriately valued and risk managed" while, at the same time, fraudulently suppressing billions of dollars of exposure to U.S. mortgages, including holdings backed by ultra-risky Alt-A mortgages, monoline insurers and ARS. *See* ¶¶ 667-71; Oct. 1, 2007 Press Release, Ex. 8;
- a December 10, 2007 press release issued from Zurich and Basel that also fraudulently suppressed UBS's true subprime mortgage, Alt-A and ARS exposure. ¶¶ 703-04, 707; December 10, 2007 Press Release, Ex. 9.

In addition, certain UBS Swiss-Based Executives participated in at least six conference calls during which certain Defendants made misleading statements that: (a) were transmitted into

the U.S.; (b) were heard by U.S. analysts and other investors while on U.S. soil;[8] and (c) prompted U.S.-based analysts to ask follow-up questions from U.S. soil (to which certain Defendants also transmitted into the U.S. misleading responses). These conference calls included:

- an August 15, 2006 conference call (Ex. 12) in which Defendant Wuffli stated that UBS's investments were "client-driven, client-franchise oriented activities" when in reality DRCM and UBS Securities were in the process of amassing $150 billion of CDOs and other subprime-related securities for UBS's proprietary portfolio, not as part of a client-driven, client-franchise-oriented strategy. ¶¶ 522-23.

- a February 13, 2007 conference call (and live webcast) (Ex. 13) during which Defendant Wuffli stated UBS's "overall risk discipline" had not changed. This was misleading because UBS employees, including Defendants Costas, Hutchins, Stehli and Martin, were manipulating the Company's "Value at Risk" or "VaR" (a statistical estimate of potential loss on a securities portfolio from adverse market movements) to conceal UBS's true market risk. The lack of controls at DRCM and UBS Securities allowed UBS to amass more than $100 billion in illiquid subprime and Alt-A mortgage-backed positions. ¶¶ 302, 555-56.

- a separate February 13, 2007 conference call ***held "exclusively for analysts and investors based in the United States…[,]"*** (Ex. 14) during which one analyst noted that a UBS chart reflecting trading profit and loss on a daily basis showed losses on about 78 days for the year and asked the question: "To lose money one in every three [business] days roughly in what's supposed to be a client-focused or client-centric enterprise sort of seems odd to me….[W]hat [am I] missing?" In response to that question, Wuffli again misrepresented UBS's exposure as being client-driven even though DRCM and UBS Securities were using UBS's balance sheet to amass a highly concentrated position in risky, illiquid assets for UBS's own account, and not in a client-driven strategy. ¶¶ 559-560.[9]

- a May 3, 2007 conference call (Ex. 15) during which investors were told that DRCM losses were "genuine mark to markets" when in reality: (a) DRCM had already conducted its $100 million internal "experiment," in which it lost $50 million in one day trying to sell subprime mortgage-backed assets in the open market; (b) DRCM trader John Niblo had already written down his portfolio by 10% and expressed concerns about DRCM's marks; and (c) the redemption to be paid to OIF investors did not truly reflect the OIF's performance. ¶¶ 612-30.

- a May 3, 2007 ***"UBS U.S. earnings call" for U.S. analysts and investors,*** (Ex. 16) during which Defendant Wuffli misrepresented the efficacy of the risk control

[8] *See* May 3, 2007 call transcript (Ex. 16 at 3-4, 8), in which Meredith Whitney, a highly-influential analyst with CIBC in N.Y., and Joanna Nader of Lehman Brothers in N.Y., asked questions. (*See* Bloomberg printout and Spoke directory listing Whitney and Nader with N.Y. addresses, Exs. 10 and 11, respectively.) *See also* Aug. 14, 2007 transcript (Ex. 17 at 16) and May 3, 2007 transcript (Ex. 15 at 9-10), in which Whitney asked questions.

[9] In addition to Meredith Whitney of CIBC, the U.S. analysts on this call included Tom Marsico, a Denver, Colorado-based investment manager (*see* www.marsicocapital.com).

framework at DRCM, while fraudulently suppressing the internal experiment and Niblo write-downs.[10] *See* ¶¶ 622-30.

- an August 14, 2007 conference call (Ex. 17) during which UBS again overstated the efficacy of its risk controls (which UBS has now admitted were "insufficiently robust"), all while concealing that UBS's valuations of its subprime and Alt-A mortgage-backed securities were not genuine marks to market and were instead materially overstated. ¶¶ 657-66.
- an October 1, 2007 conference call (Ex. 18) during which Defendant Rohner misled analysts by concealing UBS's subprime, monoline and ARS exposure. ¶¶ 678-82.
- an October 30, 2007 conference call (Ex. 20) during which Defendant Suter concealed UBS's more than $11 billion exposure to monoline insurers and multi-billion dollar exposure to ARS. *See* ¶¶ 691-98.[11]

2. Conduct Related To Auction Rate Securities

At the same time that UBS was artificially inflating its mortgage-related assets, the Company's U.S.-based employees concocted a scheme that resulted in artificial inflation of ARS. The ARS at issue in this case are securities issued primarily by U.S. municipalities and U.S.-based tax-exempt organizations. ¶ 998. The interest rates paid on the securities were determined by "Dutch auctions" conducted in the U.S. ¶ 998. UBS essentially told the U.S. investors to whom it mass-marketed ARS that ARS had the same liquidity as cash. ¶¶ 896, 998. In truth, however, ARS were highly illiquid because, as UBS knew, but fraudulently concealed from investors, the ARS market was deteriorating and UBS itself was single-handedly supporting the auctions it managed. *Id.* Indeed, a litany of e-mails document UBS's knowledge of the deteriorating auction-rate market. ¶ 895. To support the failing ARS market, UBS accumulated over $5 billion in illiquid ARS on its balance sheet and, like it did with respect to its mortgage-related assets,

[10] The U.S. analysts on this call included Tim Ryan, an analyst with Oppenheimer Funds, a U.S.-based asset manager (*see* http://www.ofiinstitutional.com/ofii/f_lcv_teambios.html).

[11] While certain transcripts do not state expressly that there were phone participants, all transcripts (except October 1, 2007) indicate that there was an "operator." In addition, other transcripts expressly indicate that there were phone participants. *See* August 14, 2007 call transcript, Ex. 17, at 6 (UBS Chief Communication officer, stated "So, we'll take questions first from analysts either in the room or on the phone."); May 3, 2007 call transcript, Ex. 15 (operator states: "Ladies and gentlemen, the conference call is now over and you may disconnect the telephone."); *see also* October 1, 2007 call transcript, Ex. 19 (entitled "Business Update Call").

overstated the value of ARS assets, ¶¶ 77-79, despite consistently representing to shareholders that high concentrations of any given asset type or illiquid assets would be avoided. ¶ 891.

3. Conduct Related To U.S. Income Tax Evasion

In direct contradiction of UBS's disclosures in its financial statements that it strictly enforced legal and regulatory requirements, senior UBS bankers helped wealthy American clients evade U.S. income taxes, ¶ 1000, as discussed more fully below.

4. False And Misleading SEC Filings

UBS's Swiss-Based Executives participated in the issuance and filing with the SEC of financial statements that: (a) fraudulently overstated the value of mortgage-related securities and ARS; and (b) falsely represented that UBS complied with law and regulatory requirements. These filings include quarterly reports on Form 6-K and annual reports on Form 20-F, and certifications by Defendants Wuffli and Standish required by the Sarbanes-Oxley Act of 2002, in which they falsely stated that the SEC filings were accurate. *See* ¶¶ 492-93.

C. U.S. REGULATORS AND LAW ENFORCEMENT HAVE CHARGED UBS WITH, AND CONTINUE TO INVESTIGATE UBS FOR, FRAUD

UBS's frauds led to a nationwide mobilization of U.S. civil and criminal law enforcement agencies at both the state and federal levels. With regard to the mortgage-related fraud, in October 2007, the SEC began investigating UBS after the press revealed DRCM trader John Niblo's previously undisclosed write-downs and subsequent firing. ¶ 792. The investigation initially included SEC subpoenas and interviews and then was ratcheted-up into a formal investigation. *See* ¶¶ 792-93. Subsequently, the media revealed that federal criminal authorities had commenced a criminal investigation into "whether UBS AG mislead [sic] investors by booking inflated prices of mortgage bonds it held despite knowledge that valuations had dropped." ¶ 796.

With regard to ARS, according to UBS's Form 6-K dated August 12, 2008 ("2008 6-K"), UBS is being investigated by the SEC and the U.S. Attorney for the District of New Hampshire,

and was sued by several state regulatory authorities, including the New York Attorney General ("NYAG"), the Massachusetts Attorney General ("MassAG"), and other state regulatory agencies represented by the multi-state ARS Task Force set up by the North American Securities Administrators Association ("NASAA"). *See* 2008 6-K at 89, Ex. 21. The ARS fraud ultimately led to the settlement of lawsuits filed by the NYAG and SEC that charged UBS Securities and a related UBS subsidiary with fraud, and the resolution of investigations by NASAA, pursuant to which UBS agreed to repurchase over $22 billion of fraudulently-marketed ARS that were sold to approximately 40,000 U.S. investors and pay a $150 million fine. *See* Aug. 8, 2008 and Dec. 11, 2008 NYAG Press Releases, Ex. 22; UBS Assurance, Ex. 5, ¶ 8 (NYAG made findings that UBS's "representations [concerning ARS] were misleading."); SEC Litigation Release No. 20824 and related complaint in *SEC v. UBS Securities LLC, et al.* (S.D.N.Y. Dec. 11, 2008), Exs. 23 & 24, respectively.[12] In a related NYAG case, UBS Securities' former general counsel was charged with insider trading for using secret information (that UBS might stop supporting auctions) to trade ARS in his personal account, resulting in disgorgement of the former general counsel's $6 million bonus and a $500,000 civil penalty. *See In the Matter of David Aufhauser*, Assurance of Discontinuance Pursuant to Executive Law § 63(15), Ex. 25.

Dedication of further scarce law enforcement resources was required to put a stop to even more UBS fraudulent conduct in the U.S. For example, on June 19, 2008, former UBS investment banker Bradley Birkenfeld, a U.S. citizen, pled guilty in the U.S. District Court to conspiring with an American billionaire real estate developer to help the developer evade $7.2 million in U.S. income taxes and assisting him in concealing $200 million of assets in Switzerland and Lichtenstein. *See* Department of Justice Press Release dated June 19, 2008, Ex. 26; 2008 6-K at

[12] UBS also settled with the MassAG and agreed to buy back $36 million in ARS it had sold to U.S. municipal accounts even though ARS were unsuitable. *See* 2008 6-K at 89, Ex. 21.

89, Ex. 21. In addition, the Internal Revenue Service ("IRS") issued civil summonses to force UBS to disclose information relating to its U.S. clients and has issued a notice informing UBS that it violated a 2001 "Qualified Intermediary Agreement" ("QIA") with the IRS. *Id.* The SEC is examining whether the activities of Swiss-based UBS financial advisors triggered an obligation for UBS to register as a U.S. broker-dealer and/or investment advisor. *See id.* Congressional hearings concluded that these and other offshore abuses were costing U.S. taxpayers about $100 billion per year.[13] Finally, the press recently revealed that: (1) the DOJ is expanding its investigation because the number of American tax evaders UBS assisted could be substantially higher than the 17,000 originally thought; and (2) "the bank is in a round of talks with the Justice Department to avert a possible felony indictment by admitting to criminal conduct and paying a penalty in the range of $1.2 billion." *See* U.S. Tax Case Against UBS Grows Wider; Talks To Settle, *Wall St. J.,* Jan. 26, 2009, Ex. 28.

ARGUMENT

I. DEFENDANTS' SUBJECT MATTER JURISDICTION ARGUMENTS ARE WITHOUT MERIT

A. THE STANDARD FOR EVALUATING SUBJECT MATTER JURISDICTION

"[W]here [, as here,] there has been no hearing and no discovery…a plaintiff need only make a *prima facie* showing of jurisdiction." *Leonard v. Garantia Banking Ltd*., No. 98 Civ. 4848, 1999 WL 944802, at *3 (S.D.N.Y. Oct. 19, 1999), *aff'd mem.*, 213 F.3d 626 (2d Cir. 2000). Defendants implicitly concede that the Complaint satisfies this *prima facie* showing because

[13] *See* "US Senate report accuses UBS, Liechtenstein of aiding massive tax evasion," *Int'l Herald Tribune*, July 17, 2008, Ex. 27. The QIA required UBS (despite Swiss bank secrecy laws) to identify customers who received reportable U.S. income, or withhold and anonymously pay a 28% withholding tax. Many U.S. clients strenuously objected to the QIA and threatened to end their relationships with UBS – highly lucrative relationships that generated approximately $200 million a year in revenues for UBS. Birkenfeld and his UBS cohorts came to the Company's rescue by: (1) helping set up sham entities as owners of UBS accounts to assist U.S. income tax evaders to conceal off-shore assets; (2) preparing false IRS forms that concealed the identity of the true owners of the UBS accounts; and (3) urging U.S. clients to destroy banking records in the U.S. and to use Swiss credit cards so the IRS could not track their assets. *See* ¶¶ 886-89; Department of Justice Press Release dated June 19, 2008, Ex. 26.

Defendants make a "factual" (rather than "facial") attack on the Court's subject matter jurisdiction over Foreign Plaintiffs' (but not U.S. plaintiffs') claims by resorting to matters outside of the Complaint. *See* DB at 5 n. 4. While reliance on matters outside the pleadings is permissible for both Plaintiffs and Defendants, *see*, *e.g.*, *Makarova v. U.S.*, 201 F.3d 110, 113 (2d Cir. 2000), to the extent that Defendants do so, their motion is "assessed by the standards that govern summary judgment motions" and they must "show that there is no genuine issue as to any material fact." *See Semi-Tech Litig., LLC v. Bankers Trust Co.*, 272 F. Supp. 2d 319, 329 (S.D.N.Y. 2003).

Further, where, as here, facts outside the pleadings are introduced, or in any case where the question of jurisdiction is a close one, a court should be "mindful of not depriving plaintiffs of their day in court with a premature order dismissing the case." *In re Vivendi Universal, S.A. Sec. Litig.*, No. 02 Civ. 5571, 2004 WL 2375830, at *7 (S.D.N.Y. Oct. 22, 2004). Under such circumstances, Plaintiffs should be allowed to conduct discovery concerning Defendants' U.S. conduct and its effects. *See Inv. Props. Int'l, Ltd. v. IOS, Ltd.*, 459 F.2d 705, 708 n.4 (2d Cir. 1972) ("discovery may well be needed" in 10b-5 case); *see Cromer Fin. Ltd. v. Berger*, 137 F. Supp. 2d 452, 483, 493 (S.D.N.Y. 2001) (allowing jurisdictional discovery).

B. THE APPLICABLE CONDUCT AND EFFECTS TESTS

In evaluating whether subject matter jurisdiction exists over a securities case with significant foreign connections, the Second Circuit has developed two tests: the "conduct" test and the "effects" test. *Alfadda v. Fenn*, 935 F.2d 475, 478 (2d Cir. 1991).[14] The conduct test "concern[s] activity in the United States that causes, or plays a substantial part in causing, harm to foreign interests overseas." *Europe & Overseas Commodity Traders, S.A. v. Banque Paribas London*, 147 F.3d 118, 128 (2d Cir. 1998). The court's job is to "identify which action or actions

constituted the fraud and directly caused harm…and then determine if that act or those actions emanated from the United States." *NAB*, 547 F.3d at 173. The effects test asks "whether the wrongful conduct had a substantial effect in the United States or upon United States citizens." *Id.* at 171; *Europe & Overseas*, 147 F.3d at 128 & n.12 (2d Cir. 1988) ("[T]he effects test concerns the impact of overseas activity on U.S. investors and securities traded on U.S. securities exchanges."). Courts have jurisdiction where "in addition to communications with or meetings in the [U.S.], there has also been a transaction on a U.S. exchange, economic activity in the U.S., harm to a U.S. party, or activity by a U.S. person or entity meriting redress." *Id.* at 130. In applying these tests, the Court must evaluate subject matter jurisdiction on the basis of the fraud as a whole, not by reference only to a particular defendant's activities in isolation. *See Cromer Fin. Ltd. v. Berger,* No. 00 Civ. 2284 (DLC), 2003 WL 21436164, at *4 (S.D.N.Y. June 23, 2003).

Contrary to Defendants' contentions that the effects test is irrelevant with respect to so-called "foreign-cubed" plaintiffs (DB at 23-26), *NAB* itself (on which Defendants rely heavily) established that there is no bright-line rule rejecting jurisdiction for the claims of foreign purchasers of foreign securities on foreign exchanges and reaffirmed that the "usual rules" apply to such foreign plaintiffs. 547 F.3d at 172. Thus, "the two parts of the test are applied together because 'an admixture or combination of the two often gives a better picture of whether there is sufficient [U.S.] involvement to justify the exercise of jurisdiction by an American court.'" *NAB*, 547 F.3d at 171; *see also Itoba Ltd. v. Lep Group PLC*, 54 F.3d 118, 122 (2d Cir. 1995) ("There is no requirement that these two tests be applied separately and distinctly…."). As demonstrated below, jurisdiction in this case is justified under either test or a combination of both.

[14] Subject matter jurisdiction here is based on Section 27 of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. § 78aa, and 28 U.S.C. § 1331, ¶ 88, but since Congress did not expressly provide for extraterritorial application of the federal securities laws, courts apply the conduct/effects tests to resolve jurisdictional issues. *Id.*

C. CONTRARY TO DEFENDANTS' ARGUMENTS, WHERE, AS HERE, THE RELEVANT TESTS ARE SATISFIED, SUBJECT MATTER JURISDICTION EXISTS FOR FOREIGN PLAINTIFFS' PURCHASES OF FOREIGN SECURITIES ON FOREIGN EXCHANGES

1. Defendants' Material Conduct In The U.S. Satisfies The Conduct Test

The Complaint alleges that Defendants' conduct in the U.S. directly caused Plaintiffs' losses. The primary goal of Defendants' fraud was to artificially inflate the value of U.S.-based subprime and Alt-A mortgage-backed assets and ARS assets on UBS's financial statements and to conceal such inflated value from shareholders. *See supra* at 8-12. This was done largely through: (1) schemes that were executed in the U.S. (specifically, concealment of the internal valuation experiment that was conducted *in New York or Connecticut*, a scheme to pay (and actual payment of) phony investment returns to OIF investors executed in *New York or Connecticut*, firing *a New York-based* DRCM trader whose actions threatened to expose the scheme, concealment of the bogus nature of "Dutch auctions" conducted *in the U.S.* that purported to support the value of ARS that were sold to *more than 40,000 U.S. investors*, and assisting *more than 17,000 wealthy Americans* in evading *U.S. income taxes*), *see supra* at 8-15; (2) statements made in the U.S. (specifically, a press release UBS *issued from New York*, statements Defendant Costas made *from New York or Connecticut*) and investor conferences DRCM and UBS Securities *held in New York* in which the financial performance of DRCM and the OIF were misrepresented); and (3) earnings conference calls UBS *broadcast into the U.S.* (in two cases, *exclusively for U.S. analysts and investors*). *See supra* at 8-12.[15] Even though the speakers in earnings conference calls may have been located outside the U.S. when they spoke, because the calls were broadcast into the U.S. and heard by analysts whose "ears" were resident on U.S. soil, these earnings calls constitute conduct

[15] While many false statements were made in the U.S., a lack of false statements emanating from the U.S. is not dispositive. *Itoba,* 54 F.3d at 124. Otherwise, the federal securities laws could be "circumvented simply by preparing fraudulent statements outside the [U.S.]." *Vivendi,* 2004 WL 2375830, at *6. Indeed, in *CL-Alexanders Laing & Cruickshank v. Goldfeld*, 709 F. Supp. 472 (S.D.N.Y. 1989), the court rejected the argument that there was no jurisdiction because "no fraudulent statements were communicated by [defendants] from the [U.S.]." *Id.* at 477.

within the U.S. for purposes of the conduct test. *See Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326, 1335 (2d Cir. 1972) ("[W]e see no reason why, for purposes of jurisdiction to impose a rule, [sic] making telephone calls and sending mail to the United States should not be deemed to constitute conduct within it."); *Cromer Fin.*, 137 F. Supp. 2d at 479 ("[C]ertain facts, such as making telephone calls or sending investment information to the [U.S.], can be 'characterized as either conduct or effects in the [U.S.].'") (quoting *Europe & Overseas*, 147 F.3d at 128 & n.13). Thus, this case involves a situation where, separate and apart from Defendants' SEC filings in the U.S., a substantial part of the misstatements "were communicated in the nation whose law is sought to be applied [*i.e.*, the U.S.]…." *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 987 (2d Cir. 1975).

Defendants' conduct not only inflated prices of UBS shares on the NYSE, but because these inflated prices were disseminated abroad and factored into the price of UBS shares on foreign exchanges, it artificially inflated prices on the SWX and LSE as well. *See* ¶¶ 1005-06.[16] This concern over misrepresentations in the U.S. influencing stock prices on not just domestic exchanges and markets, but on foreign exchanges as well, is exactly the concern Congress recognized in Section 2 of the Exchange Act, its codified statement of the need for the Exchange Act's anti-fraud provisions. *See* 15 U.S.C. § 78b(2) ("The prices established and offered in such transactions [i.e., "transactions in securities as commonly conducted upon securities exchanges and over-the-counter markets"] are generally disseminated and quoted throughout the United States *and foreign countries* and constitute a basis for determining and establishing the prices at which securities are bought and sold….") (emphasis added); *Wagner v. Barrick Gold Corp.*, 251

[16] Ultimately, UBS was forced to write down more than $38 billion in overvalued RMBS and CDOs and nearly $1 billion relating to overvalued ARS. ¶¶ 57-58, 77, 897. The revelations of these overvaluations and other disclosures, caused UBS's stock price to plunge on the NYSE. ¶¶ 1007-82. As a result, U.S. investors, including Pontiac and Teamsters, suffered substantial losses. The drop in price on the NYSE also similarly affected the price of UBS's

F.R.D. 112, 120 (S.D.N.Y. 2008) (relying upon fact that alleged materially misleading statements inflated defendant's stock price "on both the NYSE and TSE [i.e., Toronto Stock Exchange,]" court certified class including Canadians who purchased on TSE).[17]

Unquestionably, Defendants' substantial conduct (including verbal conduct) in the U.S. was "material to the completion of the fraud" and amounted to "significant acts without which [Foreign Plaintiffs'] losses could not have occurred." *Psimenos v. E.F. Hutton & Co*., 722 F.2d 1041, 1046, 1048 (2d Cir. 1983); *see also In re Alstom SA Sec. Litig.*, 406 F. Supp. 2d 346, 362-63, 387 (S.D.N.Y. 2005) (jurisdiction over foreign plaintiff class based on "accounting improprieties" at U.S. subsidiary); *In re Gaming Lottery Sec. Litig*., 58 F. Supp. 2d 62, 74 (S.D.N.Y. 1999) (jurisdiction over foreign investors where misrepresentations concerned foreign issuer's acquisition of U.S. subsidiary).[18]

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shares traded on the SWX and LSE and, thus, caused substantial losses for Foreign Plaintiffs as well. *See* ¶¶ 1009-11; *see also* Bloomberg Chart (depicting share prices on NYSE, SWX, and LSE), Ex. 29.

[17] *See also In re Royal Dutch Shell Transp. Sec. Litig.*, 380 F. Supp. 2d 509, 545 (D.N.J. 2005) (while not citing Section 2, court recognized impacts on worldwide markets when it stated: "Just as foreign stock exchange data and information is pertinent to [U.S.] investors, the reverse is also true…. The Companies' alleged fraudulent conduct which took place in the United States would, therefore, affect foreign as well as domestic investors.").

[18] As a result, there is jurisdiction despite the fact that: (a) there are foreign purchasers of foreign securities, *see Alfadda*, 935 F.2d at 478 (upholding jurisdiction over claims by foreign purchasers of foreign securities); (b) the purchases were made on a foreign exchange, *see In re Royal Ahold, N.V. Sec. & ERISA Litig.*, 351 F. Supp. 2d 334 (D. Md. 2004) (jurisdiction exists for claims of foreign purchasers on foreign exchanges when plaintiffs satisfy conduct test); and (c) financial statements were prepared and delivered to foreign investors outside of the U.S., *see SEC v. Berger*, 322 F.3d 187, 195 (2d Cir 2003) ("[W]e do not lack…jurisdiction in this case simply because the financial statements that were disseminated to the Fund's investors were prepared in Bermuda."). Defendants assert that reliance on the fraud-on-the-market doctrine to satisfy the conduct test is inappropriate, citing *In re AstraZeneca Sec. Litig.*, 559 F. Supp. 2d 453 (S.D.N.Y. 2008), and *In re Bayer AG Sec. Litig.*, No. 03 Civ. 1546 (WHP), 2004 WL 2190357 (S.D.N.Y. Sept. 30, 2004). DB at 10, 15 & n.11. But, "the Second Circuit has not addressed whether fraud on the market suffices to demonstrate the direct causal relationship required to establish subject matter jurisdiction under the conduct test." *In re Bayer AG Sec. Litig.*, 423 F. Supp. 2d 105, 113 n.2 (S.D.N.Y. 2005); *AstraZeneca*, 559 F. Supp. 2d at 466 (same). Moreover, *AstraZeneca* is inapposite because only the conduct test was applied. *See id.* at 465. *Bayer* is inapposite because that complaint, unlike here, "[did] not specify what conduct occurred in the [U.S.]," 2004 WL 2190357, at *17, contained "mere commentary" about the defendants' U.S. activities, *id.*, and merely alleged the filing of misleading SEC forms in an effort to satisfy the conduct test. *Id.* at *18.

2. The Overwhelming Effects Of Defendants' Fraudulent Conduct On U.S. Markets And Investors Satisfies The Effects Test

While the Court need not reach the effects test because the conduct test is satisfied, *SEC v. Berger*, 322 F.3d at 195, it is incontrovertible that UBS's fraudulent conduct had substantial effects on U.S. investors and U.S. capital markets because: (1) as of year-end 2007, North American investors (the overwhelming majority of which are likely to be U.S. investors) owned at least 19.2% of UBS's worldwide shares and a N.Y. clearing organization was the registered shareholder for 14.15% of all shares issued; (2) more than 50% of large institutional investors (measured by total shares held) or about 33% (measured by the number of investors) holding UBS's securities were based in the U.S., as of June 30, 2008; and (3) Defendants' fraudulent conduct directly resulted in artificial inflation of the price on the NYSE, the exchange on which almost 15% of purchases of UBS shares occurred during the Class Period.[19] *See supra* at 6.

Defendants assert that the effects test is irrelevant because Foreign Lead Plaintiffs are not U.S. residents. *See* DB at 24-26. This is simply not so. *NAB* specifically reaffirmed that the "usual rules" apply even where there are so-called "foreign-cubed" plaintiffs, 547 F.3d at 172, and the effects test contemplates analyzing the effect of the fraud on U.S. investors and markets regardless of whether there are U.S. plaintiffs (as members of a putative class or otherwise). *See Itoba*, 54 F.3d at 120-21, 124 (evaluating effects on U.S. investors even though sole plaintiff was Channel Islands company and executed purchases on London exchange).[20]

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[19] Defendants point to the relatively small loss of the U.S. Lead Plaintiff relative to the large combined losses of the Foreign Lead Plaintiffs and argue that a certified class would amount to a "small tail wagging an elephant." DB at 27-28. This argument is misplaced. "The numerosity requirement is presumed at a level of forty class members…." *Cromer Fin. Ltd. v. Berger*, 205 F.R.D. 113, 120 (S.D.N.Y. 2001) (citation omitted). Here, about 15% of Class Period purchases were made on the NYSE and there are far more than 40 U.S. investors. *See supra* at 6. Moreover, the dollar volume of any particular putative class member's claim is irrelevant.

[20] Further support for application of the effects test here is found in the existence of bilateral treaties between countries in which certain Foreign Lead Plaintiffs and other putative class members reside and the U.S. that guarantee citizens of these foreign countries the same access to U.S. courts as U.S. residents enjoy. *See* Treaty of Friendship, Commerce and Consular Rights Between the United States and Germany, Articles I and II, 44 Stat. 2132 (entered into force July 30, 1961); General Convention of Friendship, Commerce and Navigation Between the United States of America and

Defendants further argue that the existence of criminal and civil investigations in the U.S. cannot alone support an assertion of jurisdiction with respect to Foreign Plaintiffs. DB at 29. Defendants miss the point. Plaintiffs do not argue that these prosecutions and investigations, of themselves, are sufficient to permit this Court to exercise subject matter jurisdiction. But, as *NAB* recognized, the activities of U.S. law enforcement agencies certainly are relevant to the inquiry. *See* 547 F.3d at 170 ("when faced with securities law claims with an international component, we turn to the underlying purpose of the anti-fraud provisions as a guide to discern whether Congress would have wished the precious resources of the United States courts and law enforcement agencies to be devoted to such transactions.") (internal quotation marks and citations omitted). Indeed, U.S. authorities would not waste their limited resources on foreign defendants' foreign conduct unless there were substantial effects in the U.S.

Moreover, preventing the export of fraudulent activity is a key goal of the securities laws. *See Itoba*, 54 F.3d at 122 (Congress did not intend "the [U.S.] to be used as a base for manufacturing fraudulent security devices for export, even when these are peddled only to foreigners."). Thus, exercising jurisdiction in this case – where many U.S. law enforcement or regulatory entities are investigating (or have already recovered billions prosecuting) UBS's fraudulent behavior in the U.S. – will serve the purpose of avoiding exportation of fraud. *See*

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the Kingdom of Denmark, Article 2, 8 Stat. 340 (operative Apr. 26, 1826); Treaty of Friendship, Commerce and Navigation Between the United States of America and the Kingdom of Denmark, Article V, 12 UST 908 (entered into force July 30, 1961); Treaty of Friendship with Switzerland, 11 Stat. 587 (entered into force Nov. 8, 1855). *Compare Marsden v. Select Med. Corp.*, 246 F.R.D. 480, 486 (E.D. Pa. 2007) (rejecting argument that Austrian investors should not be part of certified class in securities fraud action; "Such a speculative argument is simply not sufficient to support the exclusion of [the Austrian investor] or an unknown number of foreign investors, especially when they are otherwise entitled to sue in U.S. courts."); *In re Goodyear Tire & Rubber Co. Sec. Litig.*, No. 5:03 CV 2166, 2004 WL 3314943, at *5 (N.D. Ohio May 12, 2004) (noting that "Austrians are, by treaty, entitled to the same rights and privileges before United States courts as United States citizens.'"). It is reasonable to presume that Congress, in enacting the federal securities laws, and amending them many times since their enactment without limiting jurisdiction to domestic investors, intended to include within their sweep foreigners whom U.S. treaties (ratified by the U.S. Senate) state should be afforded the same access to our courts as is granted to our own citizens. *See Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988) ("We generally presume that Congress is knowledgeable about existing law pertinent to the legislation it enacts.").

NAB, 547 F.3d at 173 ("this country would surely look askance if one of our neighbors stood by silently and permitted misrepresented securities to be poured into the United States").

D. DEFENDANTS' HEAVY RELIANCE ON *NAB* IS MISPLACED

Defendants' contention that *NAB* is "materially identical" to this case, DB at 4, and, therefore, dictates that the Court must decline jurisdiction, *see* DB at 13-17, 23-29, is wrong.[21]

In *NAB*, HomeSide, a Florida-based subsidiary of National Australia Bank ("NAB"), falsified a financial model used to calculate the value of certain assets and forwarded the results to Australia for incorporation into NAB's financial statements, which were then disseminated to the public from Australia. *See* 547 F.3d at 176. NAB's ordinary shares were not listed on any U.S. exchange. NAB did have ADRs listed on the NYSE, but they amounted to "a mere 1.1% of NAB's nearly one-and-a-half billion ordinary shares…." *In re Nat'l Australia Bank Sec. Litig.*, No. 03 Civ. 6537 (BSJ), 2006 WL 3844465, at *4 (S.D.N.Y. Oct. 25, 2006). In declining jurisdiction, the Second Circuit considered only the conduct test and found that HomeSide's manipulation of its finances in the U.S. was not central enough to the fraud. The Second Circuit reasoned that the actions taken (and not taken) by NAB executives in Australia in making disclosure decisions about the manipulated financial results sent by the U.S. subsidiary were "significantly more central to the fraud and more directly responsible for the harm to investors than the manipulation of the numbers in Florida." 547 F.3d at 176; *see id.* at 177 ("This lengthy

[21] The other cases Defendants cite are equally inapposite. *SCOR* is inapplicable because there, unlike here, plaintiffs failed to articulate any relevant effect on U.S. investors or markets, 537 F. Supp. 2d at 562-63, failed to identify any U.S. analysts that were on conference calls, *id.* at 568 & n. 17, the fraud was "masterminded" in Switzerland, *id.* at 565 (as opposed to here where the DRCM Executive Group and UBS Securities Executive Group masterminded the fraud from New York and Connecticut), and the false statements at issue were all issued from Switzerland. *Id.* *Froese v. Staff*, No. 02-CV-5744 (RO), 2003 WL 21523979 (S.D.N.Y. Jul. 7, 2003), is inapposite because the stock of the foreign issuer traded exclusively in Germany, the company made no filings with the SEC, the financial statements were published exclusively in Germany and to the extent American investors were involved, such investors made up an "exceptionally small percentage" of the total. *Id.* at *1-2. *In re Yukos Oil Co. Sec. Litig.*, No. 04 Civ. 524 (WHP), 2006 WL 3026024 (S.D.N.Y. Oct. 25, 2006), is inapposite because "[a]ll of Defendants' alleged misstatements emanated from abroad." *Id.* at *10. The only U.S. conduct was the filing of an annual report with the SEC, *id.* at *10, and a single e-mail to the foreign plaintiff's sole shareholder, who happened to be a New York resident. *Id.*

chain of causation between what HomeSide did and the harm to investors weighs against our exercising subject matter jurisdiction."). *NAB* does not control here for several reasons.

First, this case is unlike *NAB* where plaintiffs relied exclusively on false financial statements prepared abroad by a foreign issuer. *See* 547 F.3d at 168-69. As discussed earlier, the Complaint herein is not so limited because there was an abundance of U.S.-based conduct, including misleading statements "fired" from U.S. soil. *See Bersch*, 519 F.2d at 987 (discussing the "oft-cited case of the shooting of a bullet across a state line where the state of the shooting as well as the state of the hitting may have an interest in imposing its law.").

Second, in *NAB*, the Second Circuit emphasized that there was a "striking absence of any allegation that the alleged fraud affected American investors or America's capital markets," 547 F.3d at 176, and, indeed, the plaintiff in *NAB* conceded that the effects test did not apply and relied solely on the conduct test. *Id.* at 171 ("Appellants rely solely on the conduct component of the test."). Plaintiffs make no such concession here and have asserted claims on behalf of domestic Plaintiffs (Pontiac and Teamsters) over which the Court undeniably has jurisdiction. Thus, the usual "admixture" of the two tests applies. *See id*. Here, about 15% of UBS's ordinary shares were traded on the NYSE and a mobilization of U.S. law enforcement was necessary to put an end to Defendants' extensive fraudulent activity in the U.S. In *NAB*, by contrast, only 1.1% of the Australian issuer's ADRs (but no ordinary shares) traded on the NYSE. *See supra* at 23.

Third, in *NAB*, unlike here, there was no fraud investigation by any governmental agency mentioned in the Second Circuit or district court opinions, let alone intensive ones by multiple law enforcement authorities and Congress like in this case.[22] The existence of these investigations, as noted above, demonstrates the links between this case and the U.S. *See supra* at 13-15, 20-22.

[22] Defendants note that the SEC requested information about NAB's investment in HomeSide, DB at 29, but such an informal information request from a single agency with only civil jurisdiction is a far cry from the mobilization of

E. CONTRARY TO DEFENDANTS' ARGUMENT, WHERE, AS HERE, THE RELEVANT TESTS ARE SATISFIED, PLAINTIFFS NEED NOT DEMONSTRATE THAT "TIPPING FACTORS" WEIGH IN FAVOR OF JURISDICTION

Defendants assert that even if the relevant tests are satisfied, Foreign Lead Plaintiffs "also must demonstrate that additional 'tipping factors' justify the Court's exercise of subject matter jurisdiction…." DB at 20. They point to alleged *res judicata* issues and a supposed conflict with Swiss regulators as two tipping factors. DB at 21-22. Defendants are wrong.

The only relevant consideration is whether Plaintiffs have satisfied the conduct/effects tests and, as demonstrated above, they have. Defendants rely on *Europe & Overseas* to impose a "tipping factors" requirement, but their reliance on that case is misplaced. *Europe & Overseas* examined "tipping factors" where, unlike here, ***all*** the plaintiffs and ***all*** the defendants were foreign and the ***only*** conduct in the U.S. was a few phone calls and faxes to and from a foreign plaintiff, who happened to be vacationing, or on an unrelated business trip, in Florida at the time defendants sold fraudulent investments to plaintiffs. *Europe & Overseas,* 147 F.3d at 120-23. The Second Circuit, therefore, looked for a "tipping factor" to see if any "relevant interest of the [U.S.] was implicated." *Id.* at 129. Here, the U.S. conduct and effects far exceed those in *Europe & Overseas* such that there is no question that U.S. interests are implicated. *See supra* at 8-15.

Significantly, even assuming, *arguendo*, that this Court were to conclude that some examination of tipping factors is appropriate, the "tipping factors" examined in *Europe & Overseas* had nothing to do with alleged *res judicata* issues respecting absent class members. *Id.* Indeed, Defendants cite no case (nor have Plaintiffs found one) in which a court took the drastic action of declining, at the motion to dismiss stage, an exercise of jurisdiction over the claims of a foreign named-plaintiff based on *res judicata* issues as to that named-plaintiff, let alone as to

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U.S. federal and state, criminal and civil law enforcement agencies that was necessary here. *See supra* at 13-15. In any event, it does not appear that the Second Circuit considered this information request in reaching its decision.

putative class members who were not yet even before the court. Such issues, if relevant at all, should be addressed at class certification, not here. In any event, as shown below, the supposed "tipping factors" to which Defendants point are irrelevant or lack merit.

1. Defendants' Assertions That Foreign Courts Would Not Give *Res Judicata* Effect To A U.S. Class Action Judgment With Respect To Absent Class Members Is Irrelevant To The Subject Matter Jurisdiction Inquiry At This Stage Of The Proceedings

Defendants argue that the Court should consider the possibility that: (a) courts in the home *fora* of Foreign Lead Plaintiffs would not give *res judicata* effect to a U.S. class action judgment with respect to *absent class members*; and (b) courts in Denmark, the home jurisdiction of Lead Plaintiff ATP, would not give *res judicata* effect to any U.S. judgment, whether class action or not. DB at 20-21. Significantly, Defendants do not contend that German or Luxembourg courts (the home *fora* of Lead Plaintiffs Union and IFM, respectively) would not give *res judicata* effect to a U.S. non-class action judgment. Further, Defendants fail to assert any such arguments (class action or otherwise) with respect to representative plaintiff Tyneside, a resident of England. Regardless, these arguments are without merit.

First, Defendants' argument as to ATP is incorrect because ATP is a party to this action, has submitted to the Court's jurisdiction and is bound by its rulings, *see* Declaration of Lars Rohde and Bjarne Graven Larsen, dated January 27, 2009, and a non-class action judgment would bind ATP as a matter of Danish law. *See* Declaration of Jens Rostock-Jensen, dated January 30, 2009.

Second, the argument that courts in the home *fora* of Foreign Lead Plaintiffs would not give *res judicata* effect to a U.S. class action judgment with respect to *absent class members* is wholly premature at this time. That argument by Defendants is based entirely on cases that evaluate whether a representative plaintiff can satisfy, at the class certification stage, the superiority requirement for class certification under Rule 23 of the Federal Rules of Civil

Procedure. *See* DB at 20-21 (citing *Bersch* and *Vivendi* opinions rendered after class certification motions). Lead Plaintiffs are unaware of any case in which a court has used this class certification argument to deny subject matter jurisdiction at any stage, much less in the context of a motion to dismiss. *See generally Takeda v. Turbodyne Techs., Inc.*, 67 F. Supp. 2d 1129, 1139 (C.D. Cal. 1999) ("[c]oncerns respecting the *res judicata* impact of any judgment in favor of defendants, which have been the focus of decisional discussion of the difficulties inherent in certifying transnational classes, are not an issue with respect to the selection of Lead Plaintiffs, since those persons will clearly be bound by the judgment of the court.").[23]

Third, even if *res judicata* effect on absent class members were relevant and the Court were to find absent Denmark, German, or Luxembourg residents should ultimately be excluded from the Class, Lead Plaintiffs do not represent only those members of the putative class who are residents of Lead Plaintiffs' home jurisdictions. Rather, they represent investors who purchased on U.S. and foreign exchanges, which includes England, the domicile of Tyneside, and Switzerland, where a substantial number of UBS investors are resident. *See* UBS "Capital Structure" Statistics, Ex. 2. Defendants make no claim, nor can they, that English or Swiss courts would not give *res judicata* effect to a U.S. class action judgment. *See In re Alstom SA Sec. Litig.*, 253 F.R.D. 266 (S.D.N.Y. 2008) (certifying class that included English investors); *Cromer Fin.*, 205 F.R.D. at 134-36 (certifying class that included Swiss and English investors). Thus, even if Defendants are ultimately correct with respect to residents of Germany, Luxembourg or Denmark, at a bare minimum, a large class of U.S., Swiss and English investors will ultimately be certified. Therefore, this "tipping factor," in reality, weighs *in favor* of jurisdiction in this case.

[23] Plaintiffs have not submitted expert declarations concerning whether courts in Foreign Lead Plaintiffs' home jurisdictions would give *res judicata* effect to a U.S. judgment as to absent class members because the issue is premature at this juncture. However, Plaintiffs note that, with respect to Luxembourg, Defendants are wrong. *See In re Royal Dutch/Shell Transport Sec. Litig.*, 380 F. Supp. 2d 509, 547 (D.N.J. 2005) (rejecting defendants' *res judicata*

2. There Is No Risk Of Inconsistent Adjudication With Swiss Regulators

Defendants also claim as a tipping factor that if a U.S. court were to disagree with the conclusions of the Swiss Federal Banking Commission ("SFBC"), which, according to Defendants, concluded that UBS engaged in no intentional wrongdoing, it would put this Court "in the position of second-guessing the competence and conclusions of the regulatory arm of a foreign sovereign to oversee events within its own country." DB at 22. This is not so for two reasons. First, as Defendants acknowledge, *see id.*, the SFBC was applying Swiss law whereas this Court would, of course, be applying U.S. law. *See NAB*, 547 F.3d at 175 ("those who operate from American soil should not be given greater protection from American securities laws because they…carry a foreign passport or victimize foreign shareholders."); *IIT v. Cornfeld*, 619 F.2d 909, 921 (2d Cir 1980) ("We see little force in defendants' argument that sustaining jurisdiction here will somehow affront Luxembourg…. If our anti-fraud laws are stricter…, [Luxembourg] will surely not be offended by their application."). Second, UBS itself has recently contradicted the SFBC's conclusions. *See* Katharina Bart, *et al.*, UBS Shareholders Back Plan To Seek Bailout Aid, *Wall St. J.*, Nov. 28, 2008, Ex. 30 (UBS "has decided to allow another independent investigation" as to UBS's conduct in U.S. subprime mortgage market).[24]

II. EVEN IF ORIGINAL JURISDICTION OVER FOREIGN LEAD PLAINTIFFS' CLAIMS IS LACKING, THE COURT SHOULD EXERCISE SUPPLEMENTAL JURISDICTION OVER SUCH CLAIMS

The Court has original jurisdiction over the claims of U.S. investors and, if the Court finds it lacks jurisdiction with respect to any or all Foreign Plaintiffs, it should nevertheless exercise

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arguments under Luxembourg law as unpersuasive). If, however, the Court believes it needs such expert submissions to decide Defendants' motion, Plaintiffs will endeavor to provide them promptly upon the Court's request.

[24] Defendants' speculation that an exercise of jurisdiction here would drive foreign issuers from U.S. markets for fear of litigation, DB at 23 & n. 13, is irrelevant to the conduct/effects inquiry. It also lacks merit because any foreign issuer that wreaked havoc in U.S. markets the way UBS did should fully expect to have to defend itself here and, indeed, the long-standing conduct/effects tests already puts foreign issuers on notice that such will be the result.

supplemental jurisdiction over Foreign Plaintiffs' claims.[25] The Supplemental Jurisdiction statute provides:

> Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.[26]

28 U.S.C. § 1367(a); *see Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 558-59 (2005) (supplemental jurisdiction allowed over claims that could not independently meet amount in controversy requirement for diversity jurisdiction). Here, supplemental jurisdiction over Foreign Plaintiffs' claims is appropriate because it would advance the "values of judicial economy, convenience, fairness, and comity." *City of Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156, 173 (1997) (citation omitted). This is so because: (1) one litigation could potentially resolve all claims for what was a U.S.-centric fraud, thus, promoting worldwide judicial economy; (2) the Exchange Act recognizes that foreign investors are injured where, as here, fraudulent stock price

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[25] Defendants will no doubt cite *City of Edinburgh Council ex rel. Lothian Pension Fund v.Vodafone Group Pub. Co.*, No. 07 Civ. 9921 (PKC), 2008 WL 5062669 (S.D.N.Y. Nov. 24, 2008), and *SCOR*, 537 F. Supp. 2d 556. But these cases are distinguishable. In *Vodafone*, unlike here, the issue was raised in a footnote and no rationale was given for how an assertion of supplemental jurisdiction serves the interests of judicial economy, convenience, fairness or comity, 2008 WL 5062669, at *7, and the *Vodafone* case was dismissed in its entirety, whereas, here, the Court indisputably has jurisdiction over the claims of U.S.-based investors. In *SCOR*, this Court, *sua sponte*, declined to exercise supplemental jurisdiction over the claims of dismissed foreign investors based primarily on the reasoning in *In re Literary Works Electronic Databases Copyright Litigation*, 509 F.3d 116, 127-28 (2d Cir. 2007). *SCOR*, 537 F. Supp. 2d at 569 & n.19. But, reliance on *Literary Works* was misplaced because there the Second Circuit emphasized that § 441(a) of the Copyright Act "provided otherwise" within the meaning of 1367(a), *Literary Works*, 509 F.3d at 127-28, whereas here the Exchange Act contains no analogous provision. Similarly, the *SCOR* court's reliance on *Bersch* was misplaced because in *Bersch* "the state law claims of the foreign purchasers would…introduce a whole new set of issues including issues of choice of law and, if…New York would look to the laws of the countries where the sales were made, the ascertainment and application of the laws of at least fourteen different nations." *Bersch*, 519 F.2d at 996. This concern is absent here because all claims are uniformly based on the Exchange Act.

[26] Subsection (b) is inapplicable because it relates to diversity jurisdiction. Subsection (c) is inapplicable because: (a) there are no issues of state law; (b) Foreign Plaintiffs' claims do not substantially predominate over U.S. investors' claims, as U.S. investors make up a substantial portion of the class, *see supra* at 5-6; (c) the Court should not dismiss the claims for substantive reasons; and (d) given U.S. interests in not having its territories used to export fraud, there are compelling reasons for, rather than against, exercising supplemental jurisdiction over foreign investors' claims. *See infra* at 30. Finally, there is no federal statute that expressly "provides otherwise."

inflation on U.S. exchanges affected prices on foreign exchanges; *see supra* at 19 & n. 16; (3) an assertion of jurisdiction will serve the interest of not allowing the U.S. to be a base for peddling fraud to foreigners, *Itoba*, 54 F.3d at 122; and (4) international comity will be promoted because nullification of treaties ensuring putative class members access to U.S. courts will be avoided.

CONCLUSION

For the foregoing reasons, Defendants' motion should be denied. If, based on the current record, the Court concludes that the claims of any Foreign Plaintiff could be dismissed, Plaintiffs respectfully seek jurisdictional discovery, *see supra* at 16, and leave to amend the Complaint, which is freely granted. Fed. R. Civ. P. 15(a); *Foman v. Davis*, 371 U.S. 178, 182 (1962).

Dated: February 4, 2009

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CERTIFICATE OF SERVICE

The undersigned, hereby certifies that on this date, a copy of the following documents, specifically,

> Lead Plaintiffs' Memorandum of Law In Opposition To Defendants' Rule 12(b)(1) Motion To Dismiss Foreign Lead Plaintiffs' Claims (and the related declarations of Messrs. Lars Rohde, Bjarne Graven Larsen, Jens Rostoek-Jensen, and Geoffrey C. Jarvis)

were served upon the individuals registered for the Court's CM/ECF system in case 1:07-CV-11225-RJS, and I further certify that the same are being sent via overnight mail to:

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